

September 1949

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Recommended Citation

Fred Herzog, *Organization of Self-Employers by Unions*, 27 Chi.-Kent L. Rev. 263 (1949).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol27/iss4/1>

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CHICAGO-KENT LAW REVIEW

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VOLUME 27

SEPTEMBER, 1949

NUMBER 4

ORGANIZATION OF SELF-EMPLOYERS BY UNIONS

Fred Herzog*

THE ORGANIZATION of self-employers by unions presents a vexing problem.¹ Ostensibly and obviously, both groups are aligned against each other, each group attempting to obtain for itself the greatest amount of economic advantage. While a number of factors contribute to the intensity of the struggle between them, the decisive and determinative issue, at least as far as the legal evaluation of the problem is concerned, is the economic one. Both groups compete actively with each other, because both desire to receive the maximum amount of work in the field of their trade in the community in which they operate. No great amount of imagination is required to see that these competitive interests will be apt to clash and thereby often engender an aftermath in court.

The importance of the problem is enhanced by the fact that the Labor Management Relations Act, 1947, commonly known as

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¹ This article treats only with attempts by labor unions to get the self-employed person to join the union, thereby compelling him to comply with union standards. No attempt is made to discuss the somewhat related subject matter of efforts by unions to compel self-employers to cease doing work, without accepting, or offering to accept, them into membership of the union, as a means to compel the employment of union labor. For a typical case of the latter kind, see *Bautista v. Jones*, 25 Cal. (2d) 746, 155 P. (2d) 343 (1944), upholding an injunction against a milk wagon drivers' union which was attempting to coerce dairies from supplying the plaintiffs with milk products. Plaintiffs therein were independent peddlers of milk working without the help of any employees and, upon application, had been refused membership in the defendant union.

the Taft-Hartley Act,² declares the attempted organization of any "self-employed person" to be an unlawful labor objective.³ As that statute does not define the term "self-employed person," difficult questions of statutory interpretation may well arise for the term is not so definite or free from doubt as might appear at first glance.

In most instances, when courts were called upon to function as arbiters between these conflicting economic groups, they dealt with and decided the issues in accordance with their own economic philosophies rather than on the basis of any well-formulated principle founded upon sound reasoning. It is true that some courts, the United States Supreme Court being notable among them, have attempted to put their thoughts with respect to the problem into definite policies, but it seems that these policies are often times acted on "rather as inarticulate instincts than as definite ideas, for which a rational defense is ready."⁴ This article, therefore, will attempt to establish the basis for a policy which, the writer believes, might be utilized to deal justly and effectively with the problem in question. In doing so, the subject matter will be treated only from the point of view of the legality of the objective and no attempt will be made to discuss the legality of the means employed to reach that objective.

It would serve no useful purpose, in the following synopsis of court decisions, to provide a complete enumeration and analysis of all cases on the subject. The cases analyzed and referred to, however, may be used to demonstrate the way in which courts have approached the issue and determined it. Any discussion thereof necessitates a rather detailed statement of the factual situations therein involved.

² 61 Stat. 136; 29 U. S. C. A. § 141 et seq.

³ Section 8(b) (4) (A) of the National Labor Relations Act (29 U. S. C. A. § 158), as amended, states: "It shall be an unfair labor practice for a labor organization or its agents . . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal . . . where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization." Section 303 of the Labor Management Relations Act, 1947, 29 U. S. C. A. § 187, permits recovery of damages by any person injured in his business by boycotts and strikes designed to accomplish that purpose, provided the same arise in "an industry or activity affecting commerce."

⁴ Holmes, J., in his dissent to *Vegeahn v. Guntner*, 167 Mass. 92 at 106, 44 N. E. 1077 at 1080, 35 L. R. A. 722 at 726, 57 Am. St. Rep. 443 (1896).

I. PRIOR JUDICIAL TREATMENT

Perhaps the most outstanding case in the field is that of *Senn v. Tile Layers Protective Union*,⁵ although it was not primarily concerned with the efforts of a union to induce a self-employer to become a union member. The facts therein disclose that Senn was engaged in the tile-contracting business. His business was a small one, conducted, in the main, from his residence, with a showroom elsewhere. He employed, at times, one or two journeymen tile layers and one or two helpers, depending upon the amount of work he had contracted to do. Much of the work, of a character commonly done by a tile layer or helper, was personally performed by him on various jobs. The journeymen tile layers in the community were, to a large extent, members of a tile layers protective union, while the helpers belonged to a separate organization. Neither Senn, nor any of his employees was a union member. Indeed, Senn could not become a member of the former union for its rules required, among other things, that a journeyman tile layer should have acquired his practical experience by means of an apprenticeship having a duration of not less than three years. Senn had not served such an apprenticeship.

The defendant unions had attempted to induce as many employers in the area as was possible to assent to the conduct of their businesses as union shops. All contracts made between the defendant unions and union employers contained the following provision:

Article III. It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but that the installation of all materials claimed by the party of the second part as listed under the caption "Classification of Work" in the agreement, shall be done by journeymen members of Tile Layers Protective Union, Local No. 5.⁶

⁵ 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937).

⁶ 301 U. S. 468 at 474, 57 S. Ct. 857, 81 L. Ed. 1229 at 1234.

Such a contract was presented to Senn, who evidenced a willingness to execute it provided Article III was eliminated, for the inclusion thereof would clearly prevent him from working personally on the job. When the unions declared that this was impossible, the inclusion being deemed essential to the unions' interests in the maintenance of wage standards and the spreading of work among their members, while the elimination of the article would result in a discrimination against existing union contractors, Senn refused to sign. The unions thereupon peacefully picketed his place of business, causing Senn to seek an injunction on the ground that no labor dispute was involved and the picketing amounted to an interference with his property rights as protected by the Fourteenth Amendment. The Wisconsin courts refused to grant Senn the relief sought and the United States Supreme Court affirmed that action.

The majority opinion, written by Mr. Justice Brandeis, pointed to the deplorable state in which the tile laying industry had found itself because of the lack of building operations with the resultant competition which existed between members of the union on the one hand and non-union tile layers on the other in their efforts to secure work. The end sought by the union was declared not to be unconstitutional and the contract provision which Senn had been asked to accept was found not to be arbitrary or capricious, but a reasonable rule "adopted by the defendants out of the necessities of employment within the industry and for the protection of themselves as workers and craftsmen in the industry."⁷ There was no basis for any suggestion that the unions' request that Senn should refrain from working with his own hands, or their employment of picketing and publicity, was malicious in any sense, done simply from a desire to injure Senn. Each of the contestants was interested in the advantage to be gained from doing the business of the community, but the unions had acted, and had the right to act, as they did to protect the interests of their members against the harmful effects upon them of Senn's action.

⁷ 301 U. S. 468 at 480, 57 S. Ct. 857, 81 L. Ed. 1229 at 1237.

The most cursory glance at the opinion will reveal the idea expressed by the majority to the effect that union workers and self-employers, when engaged in the same type of work, are—viewed economically—nothing else than competitors and that both have the right to attempt, by all lawful means, to secure work. In that regard, the court noted that each

member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public, each may strive by legal means.⁸

The idea that employers and employees are engaged in competition with each other cannot be said to be a new one. Chief Justice Taft had recognized it long before the decision in the Senn case when, in the case of *American Steel Foundries v. Tri-City Central Trades Council*,⁹ he spoke of the “lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.”¹⁰ Even earlier than that, Justice Holmes, while serving on the Supreme Judicial Court of Massachusetts, had, in his dissenting opinion in the case of *Vegehlahn v. Guntner*,¹¹ spoken of the policy of free competition which “applies to all conflicts of temporal interests” and is “not limited to struggles between persons of the same class” but justifies “the intentional inflicting of temporal damage, including the damage of interference with a man’s business by some means when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade.”¹² Yet, it was in the Senn case, for the first time, that the highest court of the land recognized such

⁸ 301 U. S. 468 at 482, 57 S. Ct. 857, 81 L. Ed. 1229 at 1238.

⁹ 257 U. S. 184, 42 S. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360 (1921).

¹⁰ 257 U. S. 184 at 209, 42 S. Ct. 72, 66 L. Ed. 189 at 199-200.

¹¹ 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443 (1896).

¹² 167 Mass. 92 at 106, 44 N. E. 1077 at 1081.

far-reaching economic pressure as lawful when exercised by a union against a self-employer.

The United States Supreme Court followed its line of thinking, expressed in the Senn case, five years later in the case of *Bakery & Pastry Drivers and Helpers Local 802 of I. B. T. v. Wohl*.¹³ The union there involved consisted of truck drivers who were occupied in the distribution of baked goods. Wohl and Platzman, the plaintiffs, were peddlers of baked goods who bought from commercial bakeries and sold and delivered to small retailers, their profit being the difference between cost and selling price which, in the case of Wohl, was approximately thirty-two dollars a week and, in the case of Platzman, slightly more. Out of that amount, each had to absorb any credit losses and also maintain the delivery truck which he owned. Both worked seven days a week. Neither of them had a contract with the bakeries from which he bought, or any contract with the customer.

The conflict grew out of certain significant back-ground facts. It appeared that the union had, for several years, been engaged in obtaining collective bargaining agreements, prescribing the wages, hours, and working conditions of the bakery drivers. Five years or so prior to the trial, there had been comparatively few peddlers or so-called independent jobbers in the field but, with the advent of social security and unemployment compensation laws and their attendant taxes on payrolls, the number of peddlers increased by leaps and bounds. Some eighteen months before the trial, the baking companies, operating through employee-drivers, had notified the union that, at the expiration of existing contracts, they would no longer employ such men although they would permit the drivers to purchase the trucks for nominal amounts, in some instances as little as fifty dollars, after which the workers might continue to distribute the baked goods as peddlers.¹⁴ Ap-

¹³ 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942).

¹⁴ Serious disadvantages to the peddler existed under this arrangement in that he was not covered by workmen's compensation insurance, by unemployment compensation insurance, or by state or federal social security plans. If injured while working, he and his family would be apt to become public charges. For that matter, the truck was usually not insured against public liability or property damage, being commonly carried in the name of the peddler's wife or other nominee.

proximately one hundred and fifty union drivers who had previously worked under the union contracts were so discharged.

The union, being alarmed at the aggressive inroads made by this kind of competition and fearing the loss of all that had been gained by long years of struggle, attempted to persuade the peddlers to become union members. Those who so wished were admitted to membership on the understanding that they would abide by the same union rules and regulations as applied to other members, including the requirement that no union member should work more than six days per week. Wohl and Platzman were solicited and each did sign an application, but neither joined. Efforts were then made to persuade them to work only six days a week, hiring an unemployed union member for the other day. Wohl did do so for a time, but eventually both he and Platzman refused either to join the union or to comply and continued to work the full seven days. The union thereupon began to picket the bakeries which sold to them as well as the retailers who bought from them. An injunction granted by a New York state court, which enjoined the union's conduct, was deemed, by the United States Supreme Court, to violate the right of free speech guaranteed by the Fourteenth Amendment.

It may be said that the high court thereby recognized the lawfulness of the union's objective, one which, at least in part, sought the unionization of self-employers in a situation where the working conditions under which such self-employers operated vitally affected the employment conditions of the union members. The introduction of the peddler system, attempted by employers in an effort to lower the union's conditions of work, led to competition on unequal terms, competition which deprived many union men of their means of livelihood or threatened their wage and living standards. An equalization of the terms of competition by peaceful picketing was, therefore, considered lawful.

It cannot be said, however, that the state courts have always shared this view regarding the problem of unionization of self-employers. Some have treated union conduct designed to achieve that aim as an unlawful labor objective while the difference in

opinion has gone so far that courts, even in the same jurisdiction, have reached conflicting results. Typical of that divergence of opinion is the example afforded by two decisions pronounced by the Illinois Appellate Court. In the first case, that of *Naprawa v. Chicago Flat Janitors' Union*,¹⁵ the plaintiffs, who were husband and wife, had purchased an apartment building. The janitor work around the premises was done solely by the husband. When the business agent of the union told the husband that he had to join the union, he at first agreed but then refused to complete payment of the membership fee, asserting his right to perform the janitor work without joining. Thereafter, the union placed a picket line around the apartment building, preventing delivery of goods to the premises as well as the performance of work thereon by painters, decorators and other workmen. An injunction restraining the union from such conduct, and forbidding the union from interfering with the husband's right to act as janitor of the premises, was reversed by the Appellate Court.

It quoted with approval from the Washington case of *O'Neil v. Building Service Employees International Union, No. 6*,¹⁶ dealing with a similar factual situation, wherein the court, relying on the holding in *American Federation of Labor v. Swing*,¹⁷ had said:

If a labor union has the legal right to picket, as unfair to organized labor, the place of business of an employer who refuses to compel his employees to join such union or to discharge them for refusal to become members of the picketing union, it logically follows that a labor union has the legal right to go a step farther and peacefully picket the place of business of a person who has no employees, one doing business as an individual proprietor, to compel, against his will, such

¹⁵ 315 Ill. App. 328, 43 N. E. (2d) 198 (1942). Leave to appeal denied: 382 Ill. 124, 46 N. E. (2d) 27 (1943).

¹⁶ 9 Wash. (2d) 507, 115 P. (2d) 662, 137 A. L. R. 1102 (1941). That case was expressly overruled in the later case of *Gazzam v. Building Service Employee's Int. Union*, 29 Wash. (2d) 488, 188 P. (2d) 97 (1947), which reversed a trial court judgment and remanded the case for purpose of assessing damages. It is understood that, after judgment awarding damages, the Washington Supreme Court affirmed by reason of a division of the court. A petition for certiorari in the last mentioned case is now pending before the United States Supreme Court.

¹⁷ 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1941).

lone person or individual proprietor to join the picketing union.¹⁸

Direct contrast thereto is provided by the decision in *Dinoffria v. Teamsters' Union, Local No. 179*,¹⁹ wherein the plaintiffs, again husband and wife, were operators of a gasoline filling station. They conducted the business without the aid of employees, on premises and with equipment leased to them by a large gasoline supplying company from which they also purchased all gasoline and petroleum products sold at the station. The gasoline supplies were delivered in tank trucks driven by company employees who were members of the defendant union. Dinoffria was approached by an agent of the union, which represented, among other groups, the filling station employees, and was asked to join. As joining would have required compliance with certain working conditions prevailing in unionized filling stations, Dinoffria refused to apply for membership. The union drivers of the gasoline supplying company, on instructions given by the union, refused to make further deliveries and suit followed. The trial court denied plaintiff's claim for an injunction and damages, but the Illinois Appellate Court reversed the judgment, making the following characteristic, although totally incorrect, statement:

In no case, however, has the Court sanctioned, or been called upon to approve peaceful picketing or boycotting or other conduct of a labor union where it has been directed against a self-employer who has no employees, as in the instant case.²⁰

The court indicated that the sole dispute touched on Dinoffria's refusal to join the union and, as a concomitant part thereof, to sign a contract regulating the hours of work and the manner in

¹⁸ 9 Wash. (2d) 507 at 513, 115 P. (2d) 662 at 664.

¹⁹ 331 Ill. App. 129, 72 N. E. (2d) 635 (1947), noted in 25 CHICAGO-KENT LAW REVIEW 343-8. Writ of error was dismissed in 399 Ill. 304, 77 N. E. (2d) 661 (1948).

²⁰ 331 Ill. App. 129 at 135, 72 N. E. (2d) 635 at 638. Such categorical pronouncements admitting of no exceptions, whether made by a court or an attorney, are dangerous and should be avoided, especially if not based upon thorough research. Investigation would have revealed a number of cases, in Illinois and in other jurisdictions, deeming the unionization of self-employers to be a lawful labor objective.

which he was to conduct his business. It was difficult to perceive, the court declared, how union men could improve their working conditions by compelling one who was self-employed, with no employees, to become a member of their union. There could be no contention advanced that Dinoffria was failing to meet the standards of wages and employment fixed by the union, thereby jeopardizing the rights of workingmen in the same industry, for he had no employees to whom he could pay wages. It was impossible to perceive how the union was being harmed, so the only conceivable effect of membership in the union would be to put the union in a position where it could regulate the hours during which the station was kept open and to prohibit the use of premiums to stimulate sales. The primary purpose, then, of the union, in attempting to gain Dinoffria as a member, was not to obtain benefits for the existing membership but to inflict injury on Dinoffria. That, of course, was regarded as an unlawful union objective.

Is there not some contradiction in these conclusions? The union, very obviously, was attempting through unionization to introduce uniform working hours in the industry as well as to abolish the practice of furnishing sales premiums to customers. If non-union stations could keep open at all hours and offer premiums, it would mean that more and more customers would frequent them, leading to a loss of business for the unionized stations. The eventual effect that loss of business would have on the wage and living standards of union members requires no further demonstration.

II. LAWFULNESS OF UNION OBJECTIVE

The first emotional reaction to a question asking whether there is any justification for unions to organize self-employers may be best expressed in the form of still another question, *i.e.* what business has a union even attempting to organize men who are not employees? Is it not the function of a union, as well as the justification for the concerted activities of its members, to organize employees? If so, then the attempt to organize inde-

pendent businessmen, even if they be small entrepreneurs who risk only a few dollars through business initiative while earning a living in much the same manner as would employees, is properly beyond the legitimate scope of union endeavor.²¹

In general, it must be said that unions have no business attempting to organize the self-employers and should confine their efforts to promoting the interests of the employee class. Such was the primary incentive for the creation of unions and has traditionally served to mark the domain in which unions operate. Justification for a rule which would generally forbid interference by unions with the employer class lies in the fact that the small self-employer, or "businessman-worker" as he has been called,²² the one who is the most frequent target of unionization efforts, performs an important economic function in modern life. In his capacity as serviceman or repairman, he often benefits the low income groups of the population, the ones most likely to call for his services. Moreover, in a growing era of monopoly and collectivism, he is one of the last and staunchest bulwarks of the free enterprise system. Unionization might undermine his position and eventually lead to his extinction.²³

²¹ To this effect, see the opinion of Judge Cotillo in *Stalban v. Friedman*, 171 Misc. 106, 11 N. Y. S. (2d) 343 (1939).

²² For usage of this term, see *Bautista v. Jones*, 25 Cal. (2d) 746, 155 P. (2d) 343 (1944), and Charles O. Gregory-Harold A. Katz, *Labor Law: Cases, Materials and Comments* (Michie Casebook Corporation, Charlottesville, Va., 1948), p. 343 et seq.

²³ One view of the economic status of the small self-employer is given in *Stalban v. Friedman*, 171 Misc. 106 at 119-20, 11 N. Y. S. (2d) 343 at 355-6 (1939), where the court noted that "the plaintiff is a small restaurant owner. She is by such token called an entrepreneur. She falls within a group which in number, throughout industry, runs into many hundreds of thousands. The slim economic margin between success or failure in these myriad thousands of small retail businesses or establishments is quickly consumed. Too great a measure of the 'incidental injury' referred to must represent serious damage, not merely incidental damage to all such small business. . . . In the instant case, to speak of picketing being permitted because economic issues are solely involved, would drive the plaintiff's business to the wall. Bankruptcies must obviously increase under such circumstances and scores of small enterprises be forced to give up . . . *Can* unions be trusted with such power? *Should* unions be trusted with such power? *Were* unions intended to be trusted with such power? . . . We are concerned with the disappearance of a numerous small entrepreneur class risking its few dollars through business initiative and seeking to earn a living in much the same manner as the . . . proletariat does. Against his extinction . . . equity may not support a doctrine hostile to all equity law. For equity to be silent here is to acquiesce in the arraignment of one class against another, and passively watch the extinction of the one by the other in openly declared impotence . . . *It is the expropriation of an entire class from our social order.*"

III. EXCEPTIONS TO GENERAL RULE

Any general rule, such as the one just announced, has, or rather should have, its exceptions else it becomes dogmatic in its applications. The exceptions expostulated below in this article are perceived out of economic necessity. They have not been invented or created merely from a desire to produce conformity to the time-honored legal maxim that every rule has its exceptions.

A. THREAT FROM PRESENT COMPETITION

There are and should be important exceptions to the general rule which declares the unionization of self-employers to be an unlawful labor objective. First, consider the situation of the self-employer who is engaged in the same type of work and performs, with the skill of his hands, the same sort of labor as the organized employee. If he competes effectively with organized workmen, being in a position to charge a lower price for his work than others because not burdened by the same charges as fall on them such as social security taxes, should not the union be allowed to subject him to the same means of persuasion as would apply to other workmen in the effort to compel him to join the union and conform to the conditions which regulate union labor? Is it not the very purpose and function of the union to protect membership, and thereby unionized business, from the "undercutting influences"²⁴ which force lower working conditions for persons engaged in the same trade? The answer to these questions must obviously and clearly be in the affirmative.

It was recognized, at a comparatively early stage, that workmen have the right to attempt to enlarge the membership of their union by seeking to bring all those within the fold of their organization who are engaged in the same type of work in the community. Recognition thereof was based not only upon the economic principle that workmen and employers, engaged in the same industry, do compete with each other over the share and

²⁴ Gregory-Katz, *op. cit.*, p. 941.

division between them of the joint product of capital and labor but also upon the established fact that the working conditions of all persons engaged in a given trade vitally affect the wage and living standards of union members performing the same type of work in the locality. The best legal formulation of that concept is to be found in the words of Chief Justice Taft. He wrote, in *American Steel Foundries v. Tri-City Central Trades Council*,²⁵ that a

single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. . . . The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, *employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united*, because in the competition between employers *they are bound to be affected by the standard of wages of their trade in the neighborhood*. Therefore, they may use all lawful propaganda to enlarge their membership and *especially among those whose labor at lower wages will injure their whole guild*. It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious.²⁶

Twenty years later, Justice Frankfurter more tersely restated the idea when he came to note that the "interdependence of economic

²⁵ 257 U. S. 184, 42 S. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360 (1921).

²⁶ 257 U. S. 184 at 209, 42 S. Ct. 72, 66 L. Ed. 189 at 199-200. Italics added.

interest of all engaged in the same industry has become a commonplace.²⁷

Judge Andrews, writing the opinion in *Exchange Bakery and Restaurant, Inc. v. Rifkin*,²⁸ expressed much the same thought when he stated that the

purpose of a labor union to improve the conditions under which its members do their work; to increase their wages; to assist them in other ways may justify what would otherwise be a wrong. So would an effort to increase its members and to unionize an entire trade or business. It may be as interested in the wages of those not members, or in the conditions under which they work, as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization today is not based on a single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally. That they may prevail it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately . . . Both are based upon a lawful purpose.²⁹

The subject should not be left without noting that Chief Judge Cardozo, in *Nann v. Raimist*,³⁰ also indicated that if a union believes in good faith that a policy pursued by an employer and by the shops united with him is hostile to the interests of organized labor, and is likely, if not suppressed, to lower the standard of living for workers in the trade, "it has the privilege by the pressure of notoriety and persuasion to bring its own policy to triumph."³¹

²⁷ *American Federation of Labor v. Swing*, 312 U. S. 321 at 326, 61 S. Ct. 568, 85 L. Ed. 855 at 857 (1941).

²⁸ 245 N. Y. 260, 157 N. E. 130 (1927).

²⁹ 245 N. Y. 260 at 263, 157 N. E. 130 at 132-3.

³⁰ 255 N. Y. 307, 174 N. E. 690, 73 A. L. R. 669 (1931).

³¹ 255 N. Y. 307 at 314, 174 N. E. 690 at 693.

These and other decisions have recognized that industries and trades operating in certain geographical areas must be considered as economic entities wherein the working conditions which prevail in one are so interrelated to the others that the working conditions which prevail in one plant belonging to the entity are so interrelated to those existing in another plant of the same entity that lower working standards have a definite adverse effect upon higher wage and living standards. Decisions of this character recognize that such interrelation between working conditions and wage and living standards is based upon the principle of free competition, but also understand that such competition is not confined solely to members of the same group, extending as it does to members of various groups in society, both employers and employees.³² The existence of such an economic conflict, then, has been said to justify "the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade."³³

If the accepted doctrine be that union members, in the furtherance of their self-interest, whether to improve or to avert threats to their living standards, may engage in concerted activities, then it must be recognized that they may engage in such activities regardless of whether these activities be directed against the inferior working conditions of employees laboring in a large plant or against the substandard working conditions of the self-employer. The determinative factor for the lawfulness of the union's conduct is, then, the interest of the union in achieving a better living standard for its members as well as the protection of that standard from all corroding influences. The lawfulness

³² Justice Holmes, in his dissenting opinion in *Vegeahn v. Guntner*, 167 Mass. 92 at 107, 44 N. E. 1077 at 1081, 35 L. R. A. 722, 57 Am. St. Rep. 443 (1896), once noted that he had seen the suggestion made "that the conflict between employers and employed was not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life.' Certainly, the policy is not limited to struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests."

³³ 167 Mass. 92 at 106, 44 N. E. 1077 at 1081.

of the union's objective, when attempting to prevent grave inroads upon those standards, ought not be made to depend upon the source from which the danger emanates, whether that source be a single self-employer or a corporation employing thousands of non-union workers. Instead, the legality of the union's conduct should depend upon whether or not the operations which it attacks are harmful to the interests of its members and do endanger and threaten their working and living conditions. In the face of a present danger, the union should have the right to pursue all peaceful means, including picketing, to attempt to eliminate that danger.³⁴

The first exception to the general rule, that concerted activities of unions are unlawful if they have as their purpose the organization of self-employers, may then be formulated to be as follows: A union may, by peaceful conduct, attempt the organization of a self-employer if (1) such self-employer is engaged in the same general field of trade or industry in which all or some members of the organizing union are engaged, and if (2) the self-employer, by virtue of the lower working conditions under which he performs his work, either alone or with the aid of a few helpers, effectively competes with the union men and unionized businesses so as to undermine or threaten to influence disadvantageously the working conditions or the wage and living standards of the union men.

Recognition has been accorded to that exception in both the Senn³⁵ and the Wohl³⁶ cases referred to above. In the first of these cases, the court, evaluating the unionization efforts, stated that the union "*acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action.*"³⁷ In the other, the high court adopted the trial court's findings to the effect that, if employers

³⁴ The danger should, of course, be an existing and an effective one, not one merely pretended in order to give union members an excuse for destroying the business of a person against whom they happen to harbor some personal dislike.

³⁵ 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937).

³⁶ 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942).

³⁷ 301 U. S. 468 at 481, 57 S. Ct. 857, 81 L. Ed. 1229 at 1237. Italics added.

with union contracts were forced to accept the peddler system attacked therein, the wages, hours, working conditions, and benefits "attained by the union after long years of struggle [would] be destroyed and lost."³⁸ Sanction for the concerted union activities there involved rested upon the well-understood fact that a continuation of the methods adopted by the self-employer would ultimately destroy the union man's basis for earning a living in his chosen occupation.

No mention has been made, in dealing with the exception under discussion, of the fact that the Taft-Hartley Act purports to prohibit the use of strikes and boycotts for the purpose of unionizing self-employers. So far as the federal jurisdictional orbit is concerned, of course, no unionization of self-employers is practically permissible so long as that statute stands, regardless of whether such self-employers effectively compete with union members or not. Apart from a discussion of this problem to be found farther on, it might be sufficient to emphasize here, as was done by an expert in this field,³⁹ that the prohibition of the Taft-Hartley Act can hardly have any practical effect, for, in general, the organizational efforts of unions heretofore directed against self-employers have been limited to industries in which the effect upon commerce comes under the *de minimis* doctrine expressed in *National Labor Relations Board v. Fainblatt*,⁴⁰ that is in trades such as those followed by barbers, painters, retail dealers, and other small entrepreneurs.⁴¹

When it is remembered that jurisdiction over a union, for engaging in unfair labor practices under Section 8(b) of the National Labor Relations Act, as amended by the Taft-Hartley

³⁸ 315 U. S. 769 at 771, 62 S. Ct. 816, 86 L. Ed. 1178 at 1182.

³⁹ Van Arkel, *An Analysis of the Labor Management Relations Act, 1947* (Practising Law Institute, New York, 1947), particularly p. 50.

⁴⁰ 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014 (1939).

⁴¹ It would seem, according to Gregory-Katz, *op. cit.*, p. 941, that Senator Murray did not share Van Arkel's opinion. He is said to have declared that the provision in the Taft-Hartley Act with respect to self-employed persons may give "rise to the use by employers of so-called self-employed persons to undermine the wage and hours standards of employees" since it "would prevent the regular employees from taking effective action in such situations even though their wage and hour standards were directly and intimately involved."

Act, is dependent on whether the particular employer and not the union involved is "engaged in operations affecting commerce," it can be assumed that not many cases in this field will reach the National Labor Relations Board. The same prediction might also be ventured with respect to the possibility of there being cases which could be brought before appropriate federal courts under Section 303 of the Taft-Hartley Act, which purports to entitle any person, injured in his business by boycotts or strikes caused by a union in order to achieve the organization of the self-employer, to recover his damages. It is not anticipated, then, that the problem of the unionization of self-employers will be solved by legislative fiat, not even in those states which have enacted, or may enact, statutes outlawing the unionization of self-employers. The term "self-employer," apt to be found therein, is ambiguous and cannot be easily defined if the present-day realities of economic dependence are taken into consideration. Construction of that term, or similar ones, will become necessary, so the problem must come before the courts to determine the issue.

B. THREAT FROM NOMINAL SELF-EMPLOYERS

The second exception to the general rule actually flows from the first and is a part thereof. It pertains to the organization of self-employers who are such in name only, being in reality, when viewed from the economic standpoint, nothing else but employees. They present a grave problem to the unions having organized workers in the same industrial field for these businessmen, supposedly independent, are in most instances in a much worse economic position than are regular employees, whether organized or not. They are not covered by workmen's compensation laws, by unemployment compensation insurance, or by any state or federal system for social security, and their income is oftentimes inferior to that of employees doing the same type of work. They work at all hours of the day and night. No paid vacation periods exist for them and overtime payments are a thing unheard of. Unlike organized employees, these small self-employers, lacking any effective organization, are unable to bring pressure to bear upon their

suppliers, who are, in reality, their employers. Their lower working conditions inevitably tend to depress the wage standards and the employment conditions of workers engaged in the same industry.

Typical of this group are the small filling station operators who lease their stations from large gasoline supplying companies. Outwardly, they appear to be independent businessmen. But are they so in fact? Actually, they form a large sales army designed to vend, distribute, and channel the products of the affiliated supplier to the consuming public. As such, they are part and parcel of that company's organization; working under the far-reaching economic control of a company which is, as can be understood, interested in the greatest possible sales volume. Their dependence is obvious. The ground on which they live and work is ordinarily owned by the supplier. The equipment which they operate, that is the pumps and the like, are the company's property. The advertising material furnished, the gasoline that is sold, emanate from that company and that company only. Even the sales price is fixed, the operator's "profit" being the differential between the price paid and the permissible selling price. Is it not evident that the true economic status of these operators is that of employees rather than that of independent businessmen? True enough, under strict application of common-law "control" tests, they might not be classified as "employees," for the physical conduct to be performed is not dictated, but such seems hardly necessary by reason of the stereotyped character of the work involved. But, like employees, they too do not own the means of production and furnish only their labor.

Despite the fact that rise of this new class of "independent" employees is a comparatively recent phenomenon, its existence has been noted in court decisions and in legal literature. Professor Isaacs, speaking of the peculiar status of these dealers, dependent in their livelihood upon the large companies whose wares they sell and distribute, says the wholesaler or manufacturer, whom he calls the "originator of the goods," has a real interest in what the dealer does with the goods. He notes that

the originator is concerned with matters such as (1) how the goods are being displayed and "pushed"; (2) in what condition the stock is kept; (3) the kind of service given to the consumer; and (4) what is being done with the developed good will for the originator's brand.⁴² As to the dealer himself, he notes that such individual

feels that he is a part of the originator's organization. He may advertise himself as an "authorized dealer." He is ready to take a good deal of dictation from the originator, either because that originator exercises discretion in financing him or because of the value of the "franchise" or privilege of distributing an originator's much-sought-for product . . . The originator expects the dealers not merely to sell the goods, but to maintain a service connected with them for his customers . . . Dealer-helps of various kinds are to be furnished by the originator according to these contracts; missionary work, various types of advertising, the distribution of free samples and so forth.

Accordingly, *independents have been converted into agents where the originator has been sufficiently rich and powerful to accomplish this end by assuming the necessary risks and financial burdens.*⁴³

Another interesting commentary on the point is provided by Professor Steffen. He, too, has dealt extensively with this type of dealer-operator, noting that

the contractor may become a "buyer" and behind the magic word "sale" it has been possible for the manufacturer to assert a very great deal of control,—of advertising, of accounting, of sales terms, of quantities to be sold, or methods of sale and delivery. The dealer's right to territory is usually contingent upon a certain business being done. And, on the profit side, not only are the terms of sale to the dealer fixed by the manufacturer but, practically speaking, those of sale

⁴² See Isaacs, "The Dealer-Purchaser," 1 U. of Cinn. L. Rev. 373-87 (1927), particularly p. 376.

⁴³ Ibid., p. 383. Italics added.

by dealer to customer as well, the difference being a relatively fixed and narrow margin which the dealer keeps as his profit, so-called. Even the "title" of the "buyer" to the goods he sells has become an extremely attenuated thing.⁴⁴

Pointing specifically to the gasoline filling station operators, he adds:

The case of oil companies needing as they do thousands of outlets throughout the country, is an example . . . The station may be owned by the company and "leased" to the operator, or owned by the company . . . The oil company's advertising is prominently displayed at the station.⁴⁵

When these factual and economic situations are borne in mind, it becomes obvious that the so-called "independent operators" are not self-employers but employees, often more rigidly controlled and practically always less protected than any employee.

But it is not only in legal literature that notice has been taken of these facts; the courts, too, have come to grips with the problem. In the case of *National Labor Relations Board v. Hearst Publications*,⁴⁶ the United States Supreme Court declared that so-called "independent newspaper vendors," who were furnished with sales equipment, racks, boxes, change aprons, and advertising placards, and whose earnings consisted in the difference between the cost price and selling price of the papers, were not independent contractors but employees, for the purposes of the National Labor Relations Act, being regarded as an integral part of the publishers' distribution system and circulation organization. The importance of that decision lies in the recognition which it grants to the economic realities of modern business life by which self-employers, who are such in name only, are recognized to be, in reality, employees.

A characteristic statement by the court serves to add emphasis to the point. It said:

In short, when the particular situation of employment com-

⁴⁴ Steffen, "Independent Contractor and the Good Life," 2 U. of Chi. L. Rev. 501-32 (1935), particularly pp. 518-9.

⁴⁵ Ibid., pp. 519-20.

⁴⁶ 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944).

bines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protection.⁴⁷

As a consequence, it may be said that one basic idea stands forth, to-wit: the broad realities of economic life should control the law of labor relations, rather than the rigid and inflexible scheme of legal rules and classifications which has been built up in other areas. Strict legal principles and rules may find useful application in questions over the rights of persons with respect to inanimate objects; they should not control the changing economic relations of man to man.

It is true that the Hearst decision is now generally considered as having been nullified by legislative action, that is by the amendment of the National Labor Relations Act, through the Taft-Hartley Act, so as to exclude from its coverage any individual "having the status of an independent contractor."⁴⁸ Be that as it may, the fact remains that the United States Supreme Court, when it had the unfettered opportunity to consider the status of the small business operator who worked under the far-reaching and extended control of his supplier, came to the conclusion that such a person was not a self-employer but an employee.

In another case, that of *Fleming v. Demeritt Company*,⁴⁹ a question arose over the applicability of the Fair Labor Standards Act⁵⁰ to certain home workers who performed their tasks uncontrolled by any immediate supervision. The workers served a clothespin manufacturer who furnished machines and materials necessary for the assembling and packing of clothespins. They

⁴⁷ 322 U. S. 111 at 128, 64 S. Ct. 851, 88 L. Ed. 1170 at 1183. Italics added.

⁴⁸ 29 U. S. C. A. § 152(3). See also comment on this provision in Van Arkel, op. cit., p. 4.

⁴⁹ 56 F. Supp. 376 (1944).

⁵⁰ 29 U. S. C. A. § 201 et seq.

were given a specified time in which to complete the work delivered, but were free to work at such times, at such operations, whether assembling or packing, and in such manner as they desired. There was no requirement or condition imposed that the work should be done personally and, as a matter of fact, many of the home-workers received assistance from other members of the household and even enlisted the aid of social visitors. The court therein, referring to the test laid down in *Walling v. American Needlecrafts, Inc.*,⁵¹ declared that the determinative factor in deciding whether a person was an "employee" within the meaning of the Fair Labor Standards Act was not the traditional common-law test of the employee relationship, influenced by control of physical conduct in the performance of the service, but rather whether or not an employee relationship existed in the light of the history, terms and purposes of the legislation.

Much the same result has been reached by other courts, sometimes even under common law principles. In *Gulf Refining Company v. Brown*,⁵² for example, which was an action for wrongful death caused by the negligence of a gasoline distributor, the facts showed that the distributor was under a contract with the gasoline supplying company obligating him to sell the products of the company at prices fixed by it. He was required to devote his best efforts to the sale and distribution of the company's products and to transmit to the company a monthly statement of sales and stock on hand. All sales were to be made for cash, unless credit sales were authorized by the company, and daily statements of sales and deliveries, with remittance of cash receipts, was stipulated for. On the other hand, the distributor was to have entire charge of the management and operation of the business, to pay all license fees, to furnish all necessary equipment, trucks, tank wagons, and the like, furnish his own helpers and employees, and pay the expenses of conducting the business. The contract stipulated that the company should not, in any event, be responsible

⁵¹ 132 F. (2d) 60 (1943).

⁵² 93 F. (2d) 870, 116 A. L. R. 449 (1938).

for the negligence of the distributor or his employees. The court, however, imposed liability upon the company, saying:

It is pointed out that the contract expressly imposes upon Ford [the distributor] the entire charge of the management and operation of the business, the furnishing of equipment and trucks, and the employment and payment of helpers, for whose actions, in the conduct of the business, the company should have no responsibility. This denial to the refining company of any right or power to control the operations of the business, and this assumption by Ford satisfies, it is said, the test by which an employee or servant is distinguished from an independent contractor.

It may be admitted, if we confine our attention to these provisions of the contract, that Ford was constituted an independent contractor . . . but this is to see only a part of the picture . . . When all the facts are considered, it is seen that Ford's control over the business was limited indeed and that it was well-nigh within the power of the company as a practical matter to dictate his every action . . . His province was merely to find customers, make deliveries, and collect the money . . .

Some conflict of authority has arisen as to whether the distributor, under such a contract, is an employee of the oil company, or an independent contractor for whose delicts the company has no responsibility . . . But the decided weight of authority is to the contrary. Facts like those pointed out above as indicating a very complete control by the company of its products during the process of sale and delivery have been found determinative.⁵³

Considering, then, the peculiar status these so-called self-employers have been found to possess, it is only natural that unions soon began to realize the intrinsic threat which the working conditions of the "independent operators" posed to the

⁵³ 93 F. (2d) 870 at 872-3. For other cases treating "self-employers" to be employees, see *Louisiana Oil Corp. v. Rayner*, 159 Miss. 783, 132 So. 739 (1931), and *Gulf Refining Co. v. Huffman & Weakley*, 155 Tenn. 580, 297 S. W. 199 (1927).

employment standards of union members. It is, therefore, a matter of sheer self-interest and self-protection for unions to attempt to win these operators over into their organizations, so that the "self-employers" may conform to union standards. Should such unionization attempts be deemed an unlawful labor objective? Should such organizational efforts be defeated by declaring that the men who are the targets thereof have nothing in common with employees; that their economic interests lie on a different plane; that they are, in short, "independent" businessmen, representing one of the strongest pillars of the free enterprise system? The answer to such declarations obviously lies in an analysis of their economic status. It discloses that, actually, they are neither independent nor business men, are not representative of the free enterprise system but are even more rigidly controlled and dependent for their very existence upon their suppliers than regular employees.

If the basic idea of group competition, as recognized by the highest courts, is accepted and kept in mind, then it follows that unions should have the right to organize these "independent" employees so as to get them to adopt and to conform to union standards. True, some courts would have to discard the preconceived notion that these men are self-employers simply because they cannot be deemed employees under the strict rules of the "control" test.⁵⁴ The change has been made in situations involving common-law tort liability and in other instances where economic status has been evaluated, assessed and made the deter-

⁵⁴ The fallacy of this theory has been pointed out in *Nat. Labor Relations Board v. Hearst*, 322 U. S. 111 at 120-1, 64 S. Ct. 851, 88 L. Ed. 1170 at 1179 (1944). Mr. Justice Rutledge, speaking for the majority, there said: "The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as 'the test' for deciding whether one who hires another is responsible in tort for his wrongdoing. But this formula has been by no means exclusively controlling in the solution of other problems. And its simplicity has been illusory because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction."

minative point in deciding the issue. It stands to reason, then, that the same principle should apply in cases dealing with the problem of unionization for here, too, economic interests conflict with each other and economic factors form the crux of the dispute. Thus, it may be stated that whenever the economic status of the small "self-employer" shows a complete economic dependence upon his supplier or, to put it in negative form, does not show the amount of economic independence which is ordinarily possessed by the average businessman, he should be treated as an employee and the union should be permitted to attempt to organize him the same as any other employee.

It is realized that criteria based on a degree of economic dependency will be vague and uncertain, but the economic factors which will play the decisive role in matters of this kind cannot readily be pressed into the moulds of legal definitions and categories. If courts and attorneys are confronted with concrete cases, however, the problem of the degree of economic dependency of the particular self-employed person will not pose grave difficulties and can be ascertained, understood and evaluated from the particular facts. To mention but one of the criteria which might be used, the degree of economic dependency could well be established by ascertaining whether the self-employer owns the means of production, that is the capital equipment, with which he earns his livelihood, or whether those means, or an important and integral part thereof, are furnished and owned by the supplier, he merely contributing his labor. That suggestion provides no infallible yardstick, but in many instances it will fulfill the purpose.

The question might now rightfully be asked as to wherein lies the difference between the first and the second exception to the general rule enunciated above; both exceptions seem to stem from the idea of free competition and the right of unions, as is true of other groups in society, to engage in peaceful concerted activities designed to avert the harmful effects of inferior working conditions upon their own higher employment and living standards. It was previously emphasized that the second ex-

ception flows from the first, being a part thereof. But there is this distinction: in cases coming under the first exception—the competition between self-employer and union members must be made apparent, the former's working conditions being demonstrated to contain the potentiality of affecting the latter in an unfavorable fashion; under the second, the danger from undercutting competition can be presumed and need not be proven since, by settled economic principles adopted by the courts, the working conditions of employees, although outwardly parading as self-employers, will necessarily and vitally affect the wage and living standards of all workers engaged in the same type of industry or trade in the community.

The second exception, then, might be stated to be as follows: Whenever a self-employer actually has the economic status of an employee, operating and working under such far-reaching economic control on the part of his supplier that he is more or less completely dependent for his livelihood upon that supplier, a union representing the workers in the same trade or industry may lawfully organize such self-employer without having to prove the dangerous effect his working conditions will have upon the employment conditions of the union members, such dangerous potentiality being presumed to exist.

If concrete applications for the doctrine are needed, the Wohl⁵⁵ and the Dinoffria⁵⁶ cases may serve as good illustrations. The economic status of the bakery goods peddlers in the Wohl case was clearly that attaching to the employee group. As distributors, they formed the supplier's sales force. They handled only the brand manufactured by the supplier at a price which was fixed by it. The trucks used in distribution were actually the supplier's property despite nominal arrangements for their sale. Not bound by any contract, the supplier had the power to dissolve the relationship whenever it pleased. If it did, the peddler was out of work as completely as would be the case of any discharged employee.

⁵⁵ 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942).

⁵⁶ 331 Ill. App. 129, 72 N. E. (2d) 635 (1947), writ of error dismissed 399 Ill. 304, 77 N. E. (2d) 661 (1948).

An even stronger example of a situation in which the second exception could, and should, have found application is afforded by the *Dinoffria* case. The gasoline station operators there involved worked under a far-reaching economic control exercised by the large gasoline supplying company from which they had leased the station, and whose products they were obligated to sell. The ground on which they operated, the equipment with which they performed their task, was owned by the company. The price at which they bought and sold the company's products was fixed by it. They used its advertising materials. The only thing the operators supplied was their labor. To say these persons were "independent" operators because the company did not control their physical movements when performing the work magnifies attention upon a small point to the neglect and disregard of the over-all pattern of the relationship. It is the general economic status, the degree of dependence upon the supplier, which should count rather than some minor detail isolated from and lifted out of the general texture.

Even under strict control tests, the gasoline station operators there concerned might have been considered employees rather than independent businessmen. That conclusion can be reached if attention is given to the fact that the control test finds application not only in those cases where the employee's physical movements in the performance of his work are actually controlled by the employer but also in situations where the employer, not actually exercising such a control, has the right so to do.⁵⁷ As the gasoline supplier, which owned the filling station equipment, possessed the right to instruct the operator concerning the manner of handling and using the equipment, it possessed the right to control, if in fact it did not control, the operator in the physical performance of his work.⁵⁸

Because the operators there involved called themselves independent, the Illinois Appellate Court was satisfied they were,

⁵⁷ Restatement, Agency, § 220.

⁵⁸ The practice of affixing the company's instructions concerning the handling and use of its equipment to the equipment itself is fairly widespread. Is not that practice evidence of an asserted right to control the operator's conduct?

failing to take into account either their economic status or the degree of control exercised over them. The same thing is true of the Illinois Supreme Court, although it was urged most strongly to consider the point.⁵⁹ It is submitted that the question of the economic status of the so-called independent operator is one of the most important factors which should be considered and determined by a court when dealing with the problem of the unionization of self-employers. A mere mechanical approach is not sufficient, in fact is dangerous, for it fails to take into account the actualities of modern economic life, judicial aloofness from which is neither desirable nor appropriate.

There still remains the question whether, realizing that some self-employers may be so in name only but in reality are employees, the provision of the Taft-Hartley Act outlawing the unionization of self-employers will find application as to them. The House Labor Committee accompanied the amendment to the National Labor Relations Act with a statement designed to indicate that statutory terminology was planned to follow along ordinary lines and to possess ordinary meanings.⁶⁰ The Senate Report on that subject is also significant. It states:

The conferees also adopted language in the House bill excluding from the definition of "employee" individuals having the status of independent contractors. While the Board

⁵⁹ The author wrote the brief petitioning the Illinois Supreme Court for the issuance of a writ of error in the *Dinoffria* case. A substantial portion of that brief was devoted to the point that the "independent" operators involved therein actually possessed the economic status of employees.

⁶⁰ H. R. No. 245, 80th Cong., 1st Sess., p. 18, declares: "It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not farfetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee.'"

itself has never claimed that independent contractors were employees, the Supreme Court has . . . held that the ordinary tests of the law of agency could be disregarded by the Board in determining if petty occupational groups were "employees" within the meaning of the Labor Relations Act. The Court consequently refused to consider the question whether certain categories of persons whom the Board had deemed to be "employees" might not, as a matter of law, have been independent contractors. The legal effect of the amendment, therefore, is merely to make it clear that the question of whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency.⁶¹

The outstanding feature of the pertinent portions of both of these reports is the assumption that there is a clear and easily distinguishable line of demarcation between an "employee" and an "independent contractor" in the law of agency.

Everybody familiar with that field of law, however, knows that this is not so, and is aware of the difficulties abounding, both in judicial decisions and in legal literature, over the definition of the terms "employee," "servant," and "independent contractor," as well as of attempts to distinguish between them. Many borderline cases exist which defy ready insertion into established categories, the courts being forced to make decisions one way or the other to avoid an impasse. Congressional assumption that the "control" test would easily dispose of all of the difficulties to be encountered had been anticipated by the United States Supreme Court in the *Hearst* case and had been effectively answered.⁶²

Since the strict control test will not always solve the problem as to whether a person doing work for others is an employee or an independent contractor, the question arises whether, ac-

⁶¹ Cong. Rec., June 5, 1947, p. 6599.

⁶² See excerpt from opinion of Rutledge, J., set out in note 54, ante.

cepting the declarations made in the Senate and House Reports, the National Labor Relations Board or a court may still classify a person as an "employee" although he might be considered to be more of an independent contractor under agency rules. It is probable that what the lawmakers intended, in their insistence upon agency rules as the only applicable test, was the avoidance of arbitrary decisions and the assurance that courts would determine the issues in accordance with established principles. It has been heretofore emphasized that, under established principles, persons may sometimes be deemed employees even though technically not such. It might be said, therefore, that courts are still free, even under the provisions of the Taft-Hartley Act, to decide, in accordance with those principles, that a man is an employee although he might not be deemed to be one under the criteria set up by control tests. A contrary interpretation, far less sensible as well as restrictive, would require the Board and the courts, for the purposes of the National Labor Relations Act only, to apply one set of principles and disregard all other agency principles when dealing with employee-independent contractor problems. If the broader interpretation be adopted, no violation of the statute would occur out of union attempts to organize the self-employer who is such in name only.

Returning to the fundamental problem by way of summary, it may be said that the general rule justifiably should forbid the attempted organization of self-employers by unions as an unlawful labor objective inasmuch as the working and living standards of union men, in most instances, are neither threatened nor endangered by the conduct of self-employers. The exceptions herein suggested,⁶³ flowing directly from the basic principles upon which the general rule itself is founded, are just and warranted

⁶³ It is worthy of note that, under these exceptions, the two Illinois cases of *Naprawa v. Chicago Flat Janitors' Union*, 315 Ill. App. 129, 43 N. E. (2d) 198 (1942), and *Dinoffria v. Teamsters' Union, Local No. 179*, 331 Ill. App. 129, 72 N. E. (2d) 635 (1947), were each incorrectly decided. The owner janitor in the *Naprawa* case, whom the union was permitted to organize, not only apparently did nothing of detriment to union janitors but was also clearly outside the economic status of an employee. The filling station operator in the *Dinoffria* case, whose unionization was forbidden, not only had the economic status of an employee but was actively and effectively competing with union men in a way which endangered their working and living conditions.

for they will operate in an area where the unions and their membership have legitimate cause for concern. Conceding the point that a number of arguments could be raised against the ideas here spelled out, it should not be forgotten that "propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof."⁶⁴

⁶⁴ Holmes, J., in his dissenting opinion to *Vegeahn v. Guntner*, 167 Mass. 92 at 106, 44 N. E. 1077 at 1080, 35 L. R. A. 722, 57 Am. St. Rep. 443 (1896).

ASSIGNMENT OF FUTURE INVENTIONS

Harold M. Knoth*

ILLUSTRATIVE of a situation quite likely to develop from the relationship of employer and employee is the factually complicated maze revealed in the Illinois case of *Velsicol Corporation v. Hyman*.¹ The corporation plaintiff there concerned endeavored to compel the defendant, one of its officers and executive head of its research work, to specifically perform an alleged agreement to assign to the corporation certain pending patent applications covering processes discovered by him during the course of his employment. The suit failed for the reason that the plaintiff was (1) unable to show that the purported express agreement was ever signed by defendant, or (2) if so signed, was unable to give adequate proof to explain its failure to produce the signed contract. A claim that an implied agreement existed, growing out of defendant's conduct in making prior assignments of other discoveries as well as from the fiduciary relationship present between the parties, likewise failed. Much of the difficulty present in that case would have been eliminated had the employer been able to produce a formal contract executed by the parties. It should not be supposed, however, that the presence of such a contract would guarantee success to the employer whose employee has developed a patentable invention, for there is room for pitfalls even in the most skilfully devised contractual language.

The purpose of this paper is not so much to re-examine the general law on the subject but to collate and compare specific cases involving so-called employment contracts for the purpose of determining somewhat the extent to which the parties may go in the accomplishment of their intents and purposes. In some

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¹ 338 Ill. App. 52, 87 N. E. (2d) 35 (1949). Niemeyer, J., wrote a dissenting opinion. It is understood that leave to appeal has been granted.

respects, an agreement by which an employee agrees to devote his time to the making of inventions and improvements for his employer, in exchange for employment and wages or other remuneration, is similar to an agreement by which a person or company purchases an invention and seeks to acquire some form of protective interest in possible improvements on that invention. Although there may be fine distinctions between the two types of cases, and although slightly different rules may be developed on the basis of the seller's or inventor's future interest in the enterprise, whether as partner, promoter, official, owner, or the like, it will be seen that the principles are very much the same and as easy to apply in one case as in the other.

I. IN GENERAL

The general rules governing contracts to assign future inventions undoubtedly follow ordinary contract law that controls in any case involving agreements to regulate competition, such as commonly arise in situations where an employee leaves his employer to seek his fortune alone but in the same or a related field. As a broad proposition, contracts that are unreasonable are unenforcible; that is, if the restraints imposed are unlimited as to time, space or subject matter. The importation of this rule of reasonableness into the relatively limited field of the types of agreements considered here, has resulted from a slavish acceptance of, and adherence to subsequent interpretations of, the opinion in *Littlefield v. Perry*;² although that case does not actually strike down a contract. Be that as it may, the principle is sound and has been accepted by authoritative texts.³ Since the very nature of the beast requires administration by a court of equity, the several ramifications and characteristics likely to develop from individual cases will be made to appear below.

² 88 U. S. (21 Wall.) 205, 22 L. Ed. 577 (1875).

³ See, for example, Walker on Patents (Deller's Ed., Baker, Voorhis & Co., New York, 1937), § 345.

II. PECULIAR MISCELLANEOUS CHARACTERISTICS

Although an assignment agreement that is so broad as to be unreasonable or repugnant to public policy has been rather freely stated elsewhere to be unenforceable, a court of equity will, in general, give effect to such agreements as a requisite to the protection of the employer's business.⁴ And a proper agreement will be specifically enforced to require the assignment to the employer of relevant patents and applications and to enjoin the employee from conduct calculated to injure his former employer.⁵ Nevertheless, it is said,⁶ the contract should be clear and the acts alleged to have occurred or failed to occur under it should be convincing.⁷ If the agreement is good in part only, and is divisible under the usual rules, the court may give effect to the unoffensive part.⁸

Obviously such an agreement must be supported by a valuable consideration, but it need not involve a separate grant as would be required for transfer of a patent or a business.⁹ Salary paid to the employee is sufficient and, unless the contract calls for further payment, he is entitled to nothing more.¹⁰ A failure on the part of the employer to make or tender performance precisely at the time and place required will not defeat his right to have the agreement specifically performed;¹¹ although, obviously, the employer's default may be effective to free the employee.¹²

⁴ *Dry Ice Corp. v. Josephson*, 43 F. (2d) 408 (1930); *Conway v. White*, 9 F. (2d) 863 (1925); *Wege v. Safe-Cabinet Co.*, 249 F. 696 (1918). The mere fact that such litigation involves a patent naturally does not confer jurisdiction on a federal court: *Littlefield v. Perry*, 88 U. S. (21 Wall.) 205, 22 L. Ed. 577 (1875).

⁵ *Goodyear Tire & Rubber Co. v. Miller*, 22 F. (2d) 353 (1928).

⁶ *Walker*, op. cit., § 345.

⁷ *Guth v. Minnesota Mining & Mfg. Co.*, 72 F. (2d) 385 (1934), cert. den. 294 U. S. 711, 55 S. Ct. 506, 79 L. Ed. 1245 (1935).

⁸ *Idem*.

⁹ *Lion Tractor Co. v. Bull Tractor Co.*, 231 F. 156 (1916).

¹⁰ *Westinghouse Elec. & Mfg. Co. v. Formica Insulator Co.*, 266 U. S. 342, 45 S. Ct. 117, 69 L. Ed. 316 (1924), affirming 288 F. 330 (1923).

¹¹ *Conway v. White*, 9 F. (2d) 863 (1925). The employer therein became bankrupt, but assignment was nevertheless compelled.

¹² *Brown Perfection Tube Co. v. Brown*, 233 F. 676 (1916).

The agreement need not be in writing, if other conditions are met,¹³ hence it may be either express or implied;¹⁴ the parties' understanding thereof being evidenced by the fact that the employee has previously made assignments to his employer.¹⁵ These principles, as well as those hereafter stated, are applicable to the United States government and its employees,¹⁶ as well as to other persons.

Attempts of employees to circumvent such agreements have been as ingenious as they have been numerous. They have not succeeded by attempting to treat the agreement as a species of option to the employer to purchase the inventions.¹⁷ Nor may the employee so bound make related inventions for third persons.¹⁸ If the employee, after the termination of his employment, secures a patent including other inventions in addition to those rightly belonging to his former employer, he may be treated as one who has wrongfully commingled goods, in this case ideas, and the burden is on him to establish a contrary situation in his favor.¹⁹ On the other hand, a contract will not be construed to prevent an inventor, after severance of his employment, from making similar inventions for another, in the absence of conflict with reasonable provisions of the contract.²⁰

He may not defend on the ground that the contract contains no provision for future assignment of patents covering included inventions, for such covenant will be implied,²¹ but the employer may, at any time, release the employee from his contract, either

¹³ *Magnetic Mfg. Co. v. Dings Magnetic Separator Co.*, 16 F. (2d) 739 (1927), cert. den. 274 U. S. 740, 47 S. Ct. 586, 71 L. Ed. 1320 (1927).

¹⁴ *U. S. v. Dubilier Condenser Corp.*, 289 U. S. 178 and 706, 53 S. Ct. 554 and 687, 77 L. Ed. 513 and 1462 (1933).

¹⁵ *Bowers v. Woodman*, 59 F. (2d) 797 (1932). See also *Goodyear Tire & Rubber Co. v. Miller*, 22 F. (2d) 353 (1928).

¹⁶ *U. S. v. Dubilier Condenser Corp.*, 289 U. S. 178 and 706, 53 S. Ct. 554 and 687, 77 L. Ed. 513 and 1462 (1933).

¹⁷ *Hebbard v. American Zinc, Lead & Smelting Co.*, 161 F. (2d) 339 (1947).

¹⁸ *New Jersey Zinc Co. v. Singmaster*, 71 F. (2d) 277 (1934). See also *Conway v. White*, 9 F. (2d) 863 (1925), concerning the commingling thereof with inventions made before employment.

¹⁹ *New Jersey Zinc Co. v. Singmaster*, 71 F. (2d) 277 (1934).

²⁰ *Idem*.

²¹ *Littlefield v. Perry*, 88 U. S. (21 Wall.) 205, 22 L. Ed. 577 (1875); *Wege v. Safe-Cabinet Co.*, 249 F. 696 (1918).

generally or for isolated instances, and that release may be either express or implied.²²

An agreement requiring the assignment of future inventions, even though valid, is not such an instrument as, by statute, is entitled to recording in the Patent Office,²³ so the recording thereof does not operate as constructive notice to a subsequent purchaser.²⁴

It seems that the respective rights of the parties should be originally formulated by a proper bi-lateral contract, but in one case, that of *New Jersey Zinc Company v. Singmaster*,²⁵ no objections were raised to the enforcement of printed instructions issued to employees subsequent to their employment.

III. PERMISSIBLE SCOPE

The foregoing has covered briefly the general principles developed by the courts in the application of ordinary law to agreements pertaining to future inventions. There remains for consideration only the requisites of such agreements as to subject matter—the nature of the inventions involved, and time—the period covered by the contract.

A. AS TO SUBJECT MATTER

It follows from the general rule regarding the unenforceability of assignments in gross, that the invention or class of invention must be kept within or related to the subject matter of the agreement to the extent that such subject matter is either a specific type of invention or machine or a particular business. In *Aspinwall v. McGill*,²⁶ for example, the assignment as to future inventions and improvements was properly related to the invention ini-

²² *Parker Rust-Proof Co. v. Allen*, 231 Mich. 69, 203 N. W. 890 (1924), wherein the company evinced no interest in the employee's invention, though solicited, until the employee had negotiated elsewhere.

²³ 35 U. S. C. A. § 47.

²⁴ *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.*, 164 F. 47 (1908).

²⁵ 71 F. (2d) 277 (1934). The text of the printed instructions is set out in the appendix hereto, Case I.

²⁶ 32 F. 697 (1887).

tially purchased, so the court could find no attempt to mortgage the brain of the inventor. In other cases dealing strictly with the inventions of employees, no case has been found in which an objection has been successfully raised against language in the contract defining the subject matter in terms of its relation to the employer's present business²⁷ or to business or matters in which he *may* be concerned.²⁸ Obviously, and as a matter of common sense, an employer would not be expected to limit the agreement to a specific line of products. Likewise, it would not be expected that, under general language in such agreement, he could properly become "interested or concerned" in a new and unrelated field after and simply because a bound employee made a valuable invention in such new field. Further, the agreement is not invalid as to subject matter if it embraces processes, apparatus, and the like, as well as products or machines.²⁹

B. AS TO TIME

This phase of the consideration herein may appear to overlap somewhat the consideration as to subject matter, especially in so far as it relates to inventions already made. But, since it concerns the time of making the invention, it is thought to be properly classified here, as will be seen. In general, inventions as to time may be made (1) before, (2) during, or (3) subsequent to the period of employment.

In at least four cases, the agreement covered inventions "now known,"³⁰ or "made"³¹ by the employee. In the *United Aircraft* cases,³² the question as to inventions "now known" to

²⁷ See Appendix, Cases A, B, C, D, G, H, and K.

²⁸ Appendix, Cases E and J. Contra: Case L.

²⁹ Appendix, Cases G, H, J, and K.

³⁰ Appendix, Case J.

³¹ Appendix, Cases B, C, and K.

³² *United Aircraft Products Co. v. Warrick*, 79 Ohio App. 165, 72 N. E. (2d) 669 (1945); *United Aircraft Products Co. v. Cruzan*, 76 Ohio App. 540, 62 N. E. (2d) 763 (1945). These related cases involved inventors who, originally employed without contract, were ultimately brought under contract. They had made an invention in the interim. It was determined that the invention came under the contract since it was "known" at the time of the execution of the contract. See also *A. B. Dick v. Fuller*, 198 F. 404 (1912).

the employee was squarely presented, and in both cases it was held that the phrase meant inventions known to the employee at the time of the making of the agreement.

Since the main purpose of an agreement for the assignment of future inventions is to secure to the employer the requisite rights in and to inventions made on his time and with his material and by virtue of the employment, no one has questioned his right to inventions made during the period or term of the employment, and every contract will contain this or similar language.³³

The most sensitive phase of the time aspect of such agreements is that involving strictly "future" inventions; that is, inventions conceived or made subsequent to the term of employment. Since it may be expected that an inventor cannot open and close his mind like a book, many contracts include a provision extending the contract beyond the immediate employment period for a certain length of time. In *National Cash Register Company v. Remington Arms Company*,³⁴ a provision extending the contract for one year beyond the end of the employment was said to be offensive. The point was not directly involved, however, and the remarks of the court are plainly dicta. A similar provision was directly presented in the case of *Goodyear Tire & Rubber Company v. Miller*³⁵ and there found not to be objectionable. In one other case, the employer attempted to extend the contract for five years after the employment period but, the subject matter of the contract being declared illegal, no consideration was given to validity of the time provision.³⁶

³³ Even in the absence of language limiting or relating the time of the invention to the period of employment, the contract may be so construed by the court for the purpose of taking it out of the broad prohibition of the general rule: *Thibodeau v. Hildreth*, 124 F. 892 (1903), affirming 117 F. 146 (1903). The text of the contract appears in Appendix, Case B.

³⁴ 242 N. Y. 99, 151 N. E. 144 (1926). See also, Appendix, Case F.

³⁵ 22 F. (2d) 353 (1928); Appendix, Case G.

³⁶ *Lanteen Laboratories, Inc. v. Clark*, 294 Ill. App. 81, 13 N. E. (2d) 678 (1938). The contract of employment, among other things, required the inventors to assign during the employment period and for five years thereafter. Four years after leaving the company's employ, the inventors filed an application on a device that the company thought was within the contract. The trial court found, with the aid of a patent attorney sitting as a special commissioner, that the invention

On the basis of what has been set forth above, it appears that the courts will uphold and enforce any proper and reasonable contract in which the inventions covered are (1) made or conceived prior to or in the course and during the time of employment or within a reasonable time thereafter,³⁷ and (2) relate to the particular or general business of the employer or to the purpose for which the agreement was made.³⁸

Although it has been shown above that such contracts have not been declared improper because they included inventions made *before* the period of employment³⁹ and extended to inventions relating to subject matter in which the employer "may" become interested,⁴⁰ neither provision is unequivocally recommended in view of the decision in the case of *Guth v. Minnesota Mining & Manufacturing Company*.⁴¹ This case also places an apparent limitation on a contract provision that was construed to extend the employer's rights beyond the term of employment.

Yet, a close analysis of the decision reveals no real conflict with the general principles outlined above. The late Judge Evans decided the case on the basis that: (1) the agreement sought to cover inventions made both before and after the period of employment; (2) the agreement could be extended to business of the employer's predecessor or successor; (3) it sought to cover subject matter in which the employer "may be concerned" in the future; and (4) the contract could not be specifically enforced as long as the employee, upon a proper showing, could not swear to the oath of the patent application.

of the applicants was not related under the contract and dismissed the bill. No question was raised as to the five-year extension. On appeal, the Illinois Appellate Court itself, and for the first time, raised the question of illegality of the subject matter (birth control devices) and affirmed the decision dismissing the bill.

³⁷ One year, for example: *Goodyear Tire & Rubber Co. v. Miller*, 22 F. (2d) 353 (1928), and Appendix, Case G.

³⁸ This much must be accepted, upon any reasonable construction of any such agreement. It will be found that equivalent language appears throughout the cases listed in the Appendix.

³⁹ See Appendix, Cases B, C, and K.

⁴⁰ See Appendix, Cases E and J. Contra: Case L.

⁴¹ 72 F. (2d) 385 (1934), cert. den. 294 U. S. 711, 55 S. Ct. 506, 79 L. Ed. 1245 (1935).

Primarily, the contract was held bad to the extent that it could be construed to require assignment of inventions "hereafter" made, and such construction was resorted to by the court to support its declaration that, under this contract, "he was, however, if he worked in another laboratory or for another manufacturer, required to assign his discoveries to appellee. This would effectively close the doors of employment to him."⁴² This absurd result is avoidable, however, by construing the provision in the light of the limiting phrase "during the period of my employment," which is quite obviously the real meaning of the provision, for "predecessor" and "successor" were used to merely standardize the form of the contract for purposes of possible corporate reconstruction.

The decision does not validly establish the repugnance of the phrase "or may be concerned" as related to subject matter, since, as a practical matter, an employer, especially a corporate employer, constantly adds new products to its business and if the employee's invention is made after the adoption of such new product and relates properly thereto, it should be included in the agreement. A contrary result could require the execution of new agreements with every expansion of the employer's business.

Ultimately, the court was satisfied that Guth could not make the oath in the application in suit. Whether such satisfaction was properly supported is beyond the scope of the present study. It can be accepted, however, that that is the real basis for the decision and the general criticism of the agreement was not required. It is interesting to note that of the authorities so copiously⁴³ cited by the court, only one⁴⁴ actually held a contract invalid as being contrary to public policy. The Guth case, then, can stand for no more than the proposition that equity will not compel an inventor to execute an oath for a patent application

⁴² 72 F. (2d) 385 at 388.

⁴³ One should not be unduly impressed by the sheer number of authorities cited, for there are many duplications, some under the guise of parallel citations (c.f. *King v. Gannon*, cited in note 3 as 158 N. E. 346 and in note 4 as 54 A. L. R. 1215), and others by separately including the appellate decision and the decision affirmed (c.f. *Thompson v. Automatic Fire Protection Co.*, 211 F. 120 and again as 155 F. 548).

⁴⁴ *King v. Gannon*, 261 Mass. 94, 158 N. E. 346, 54 A. L. R. 1215 (1927).

where he properly shows that he believes himself not to be the first inventor.

The case does not weaken the decisions in the United Aircraft,⁴⁵ Goodyear⁴⁶ or Hebbard⁴⁷ cases, nor does it indicate that the employment contracts therein are in any way defective or susceptible to attack on the ground that they are unconscionable. Further, the great weight of authority appears to be that such contracts must indeed be bad to fail to elicit some response from the court. Even the court in the Guth case would have enforced what it said was the reasonable portion of that agreement.

APPENDIX OF AGREEMENTS*

1. NOT OBJECTIONABLE

A. *Aspinwall Mfg. Co. v. McGill* (Note 26).

Assignment of patent "together with all improvements I may *hereafter* make, without further cost."

B. *Thibodeau v. Hildreth* (Note 33).

"... in consideration of such employment . . . and . . . wages . . . agree . . . that I will give . . . full benefit and enjoyment of any and all inventions or improvements which I *have made* or may *hereafter* make relating to machines or devices pertaining to said . . . business."

C. *Wege v. Safe-Cabinet Co.* (Notes 4, 21).

"all *present* and *future* improvements of the safe-cabinet" and "all developments and inventions embodying any or all of the principles involved [therein] due in part or altogether" to employee's "talent and labor" saving to employee "full property rights in all patents secured by him for inventions in steel or other construction, except as above stated . . ."

⁴⁵ See note 32, ante.

⁴⁶ 22 F. (2d) 353 (1928).

⁴⁷ 161 F. (2d) 339 (1947).

* Possible controversial language has been underscored for emphasis.

D. *Parker Rust-Proof Co. v. Allen* (Note 22).

“ . . . all rights to . . . any inventions that I may hereafter make while in its employ, in the rust-proofing of iron and steel . . . ”

E. *Conway v. White* (Notes 4, 11, 18, 28, 40).

“ . . . all invention . . . made . . . during the term of . . . employment, which in any way may affect any articles manufactured by [employer] and used or *capable of being used* in [employer's] business . . . ”

F. *National Cash Register Co. v. Remington Arms Co.* (Note 34).

Agreement required assignment of any invention made during employment and *within year after termination* of employment. Case contains dictum to effect that such clause is offensive. Compare *Goodyear Tire & Rubber Co. v. Miller* (Appendix, Case G) and *Guth v. Minnesota Mining & Mfg. Co.* (Appendix, Case L).

G. *Goodyear Tire & Rubber Co. v. Miller* (Notes 5, 27, 29, 35, 46).

“ . . . any and all improvements . . . during . . . my employment . . . or *within one year* from the termination of my employment, in respect to: Methods, processes, or apparatus concerned with the production of any character of goods or materials sold or used by the . . . Company; or (2) in respect to such goods, etc., themselves.”

H. *Dry Ice Corp. v. Josephson* (Note 4).

“ . . . any inventions or processes which I may at any time during the course and period of employment by the [Company] evolve or create relating to Prest-Air devices or Prest-Air Refrigeration, and in and to any patent rights in the United States or elsewhere, which I may receive or to which I may be entitled by virtue of such inventions or processes.”

I. *New Jersey Zinc Co. v. Singmaster* (Notes 18, 19, 20, 25).

General instructions issued to employees subsequent to their employment read: “all patentable ideas and devices originating with, or developed by, an employee of this Company, while in the employ of the Company, shall belong to the Company, and shall be assigned to the Company by the patentee.” Note: The inclusion of this case in the group of cases held not objectionable should not be construed to indicate general approval of the practice of issuing such “instructions.”

J. *United Aircraft Products, Inc. v. Warrick; Same v. Cruzan* (Notes 28, 29, 30, 32, 45).

“... any and all inventions, discoveries or improvements in any way relating to aircraft parts and accessories, or other items of manufacture, manufactured and/or sold by said company during the term of said employment, or to processes or apparatus particularly adapted to the manufacture of such parts, accessories or other items invented by him *during the term of said employment*, or to improvements on any such inventions whenever made by him in the line of work or investigation which the company is, *or may be*, engaged in during the term of said employment, which . . . are *now known* to the [employee], or discovered or made by the [employee], either in whole or in part, during the terms of said employment, shall immediately become the absolute property of the company . . .”

K. *Hebbard v. American Zinc, Lead & Smelting Co.* (Notes 17, 27, 29, 31, 47).

“... any and all inventions, discoveries, machines, devices, apparatus, processes or improvements to any thereof, which I *have made*, discovered or invented, or which I may hereafter make . . . while in the employ of [and] relating to the business of said company.”

II. OBJECTIONABLE

L. *Guth v. Minnesota Mining & Mfg. Co.* (Notes 7, 8, 28, 40, 41).

“(a) . . . all . . . inventions which I *have made or conceived*, or may *at any time hereafter* make or conceive . . . relating to abrasives, adhesives or related materials, or to any business in which said company during the period of my employment by said company or by its *predecessors or successors* in business is *or may be* concerned, and (b) . . . inventions which, during the period of my employment by said company or by its predecessors or successors in business, I *have made or conceived* or may *hereafter make or conceive* . . . or in the time or course of such employment, or with the use of said company’s time, material or facilities, or relating to any subject matter with which my said work for said company is *or may be* concerned . . .”

CHICAGO-KENT LAW REVIEW

PUBLISHED DECEMBER, MARCH, JUNE AND SEPTEMBER BY THE STUDENTS OF
CHICAGO-KENT COLLEGE OF LAW, 10 N. FRANKLIN ST., CHICAGO, ILLINOIS
Subscription price, \$2.00 per year Single copies, 75c Foreign subscription, \$2.50

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VOLUME 27

SEPTEMBER, 1949

NUMBER 4

DISCUSSION OF RECENT DECISIONS

ADOPTION—CONSENT OF PARTIES—WHETHER OR NOT CONSENT FOR ADOPTION GIVEN BY NATURAL PARENT MUST STRICTLY FOLLOW STATUTORY FORM AND, HAVING ONCE BEEN GIVEN, BECOMES FINAL AND NOT SUBJECT TO WITHDRAWAL—In the case of *Petition of Thompson*,¹ the Appellate Court of Illinois for the Second District recently had occasion to construe, for the first time, certain sections of the recently enacted Adoption Act dealing with the manner and form by which parental consent to adoption

¹ Sub nom. *Thompson v. Burns*, 337 Ill. App. 354, 86 N. E. (2d) 155 (1949).

is evidenced.² One Sarah Burns, the natural mother of the child there involved, executed a written consent for the adoption of her child by the petitioners. The form was witnessed by a licensed attorney but not one who had been specifically designated for that purpose. After custody of the child had been surrendered to the petitioners, proceedings for adoption were begun. Sarah Burns appeared therein, retracted her consent, and demanded that the child be returned to her, claiming (1) that such consent was void because not acknowledged in the manner required by statute, or (2) that she had the right to, and did, withdraw her consent prior to the time the court acted upon the petition. The trial court, however, granted adoption by the petitioners. That decree, on direct appeal taken by the mother,³ was reversed on the ground that the alleged consent, not being in conformity with the mandatory requirements of the Adoption Act, furnished no valid ground for a finding that the mother had consented to the adoption of her child, particularly when such finding was questioned on direct appeal from the decree. It was further added, by way of dicta, that a parent has the right to withdraw any consent that may have been given so long as the withdrawal occurs at any time before the court has actually acted upon it.

The process of adoption, or the establishment of an artificial parent and child relationship, being a process unknown to the common law, can exist only when so authorized by state statute.⁴ In the absence of specified exceptions not here applicable, the consent of either the natural parent, the legal guardian, or of an authorized welfare agency is deemed essential to establish the relation.⁵ An examination of the various state statutes, however, would indicate that there is no agreement on the point as to the form or manner by which this requisite consent must be made manifest.⁶ One authority in the field of domestic relations, when discussing the subject, once grouped the statutes into three categories: (1) those

² Ill. Rev. Stat. 1947, Ch. 4, § 3—6, reads: "Whenever in this Act, the consent of any person is required, such consent shall be in writing and shall be acknowledged by the person signing the same in open court, or before the clerk of the court in which the petition is filed, or such signature shall be witnessed by the duly authorized probation officer of such court or a representative of a licensed welfare agency, or by any other person designated by the court." The statute contains further directions as to consents executed outside of Illinois. Section 3—7 provides that no decree shall be entered, except under designated circumstances, without such consent.

³ Appeal is permitted by Ill. Rev. Stat. 1947, Ch. 4, § 7—2. But see Zacharias, "Judicial Review of Adoption Decrees," 23 CHICAGO-KENT LAW REVIEW 233-49 (1945).

⁴ 2 C. J. S., Adoption of Children, § 2. An ancient and curious case which might indicate that the contrary is true, is discussed at length in Zane, "A Mediaeval Cause Celebre," 1 Ill. L. Rev. 363 (1907).

⁵ 1 Am. Jur., Adoption of Children, § 36.

⁶ Compare, for example, Deering Cal. Civ. Code 1941, Div. 1, Tit. 2, Ch. 2, § 224m, with Minn. Stat. Ann. 1945, Vol. 17, Ch. 259, § 259.03.

which require a signed writing verified by either acknowledgment in open court, before some authorized person, by being witnessed, or supported by affidavit; (2) those which require an informal written consent or call for the presence of the parents in open court; and (3) those which require no specific form but merely state that the parents must consent.⁷ As a matter of fact, three state statutes do not make specific reference to consent⁸ while one requires that the consent be set out in the petition.⁹ Of the remainder, some twenty-five fall in the first category,¹⁰ sixteen in the second,¹¹ and only three in the third.¹² There is some indication, from the language of the more recently enacted statutes, of an apparent trend toward the first or more detailed type of consent which may some day lead to a nationwide similarity,¹³ consequently there is justification for the assumption that the question arising in the instant case is likely to occur, if it has not already occurred, in a widening range of jurisdictions.

Turning from statutory language to judicial decisions on the point, it may be noted that the reasoning of the Supreme Court of Idaho in the case of *Vaughn v. Hubbard*¹⁴ is based on an Idaho statute which requires

⁷ Vernier, *American Family Laws* (Stanford Univ. Press, California, 1936), Vol. 4, p. 395, § 260.

⁸ Fla. Stat. Ann. 1941, Vol. 6, Ch. 72, §§ 72.01-72.06; Flack, Ann. Code Md. 1939, Vol. 1, Art. 16; S. C. Code 1942, Vol. 1, § 255(19).

⁹ Ga. Code 1933, Ch. 74, § 74-402.

¹⁰ Ark. Stat. 1947, Tit. 56, Ch. 1, § 56-106; Deering Cal. Civ. Code 1941, Div. 1, Tit. 2, Ch. 2, § 224m; Del. Rev. Code 1935, Ch. 88, § 2; Ida. Code 1948, Tit. 16, Ch. 25, § 1601; Ill. Rev. Stat. 1947, Ch. 4, § 3-6; Burn's Ind. Stat. Ann. 1933, Vol. 2, Ch. 1, § 3-120; Iowa Code 1935, Vol. 1, Ch. 473, § 10501-3; Ky. Rev. Stat. 1948, Ch. 405, § 405.200; Dart La. Gen. Stat. 1939, Vol. 3, § 4827; Mich. Stat. Ann. 1943, Vol. 23, Ch. 266, § 27.3178; Miss. Code 1942, Vol. 2, Tit. 10, Ch. 2, § 1269; Mo. Rev. Stat. Ann., 1948 Supp., Vol. 20, Ch. 56, § 9609; Neb. Rev. Stat. 1943, Vol. 3, Ch. 43, § 104-6; Nev. Comp. Laws 1938, Vol. 4, § 9476; N. J. Stat. Ann. 1939, Tit. 9, Ch. 3, § 9:3-4; McKinney Consol. Laws N. Y. Ann. 1941, Vol. 14, Art. 7, § 112.5; Page Ohio Gen. Code Ann. 1938, Vol. 7, Ch. 12, § 10512-19; Ore. Comp. Laws Ann. 1940, Vol. 8, Tit. 126, § 126-328; Williams Tenn. Code Ann. 1934, Vol. 3, Ch. 14, § 4733; Utah Code Ann. 1943, Vol. 1, Ch. 4, § 4; Va. Code Ann. 1942, Ch. 216A, § 5333d; Vt. Stats. 1947, Ch. 420, §§ 9940 and 9947; W. Va. Code Ann. 1943, Ch. 48, § 4755; Wis. Stat. 1947, Vol. 2, Ch. 322, § 322.04; Wyo. Comp. Stat. Ann. 1945, Vol. 4, Ch. 58, § 58202.

¹¹ Ariz. Code 1939, Vol. 2, Ch. 27, § 27-203; Col. Stat. Ann. 1935, Ch. 4, § 1; Conn. Gen. Stat. 1949, Vol. 3, Ch. 335, § 6866; Kan. Gen. Stat. 1935, Ch. 38, § 105; Me. Rev. Stat. 1944, Vol. 2, Ch. 145, § 36; Ann. Laws Mass. 1932, Vol. 6, Ch. 210, § 2; Rev. Laws N. H. 1942, Vol. 2, Ch. 345, § 2. N. M. Stat. Ann. 1941, Vol. 2, Ch. 25, § 23-207; Rev. Code Mont. 1935, Vol. 3, Ch. 9, §§ 5859-61; Gen. Stat. N. C. 1943, Vol. 2, Ch. 48, § 48-5; Okla. Stat. Ann. 1936, Tit. 10, Ch. 2, § 44; Purdon Pa. Stat. Ann. (perm. ed.), Tit. 1, §§ 2-3; Gen. Laws R. I. 1938, Ch. 420, § 2; S. D. Code 1939, Vol. 1, Ch. 14, § 14-0403 and § 14-0406; Vernon's Tex. Civ. Stat. 1947, Vol. 1, Art. 46a, § 6; Remington's Rev. Stat. Wash. 1932, Vol. 3, Ch. 5, § 1696.

¹² Ala Code 1940, Tit. 27, Ch. 1, § 3; Minn. Stat. Ann. 1945, Vol. 17, Ch. 259, § 259.03; N. D. Rev. Code 1943, Vol. 2, Ch. 14-11; § 14-1104.

¹³ Vernier's compilation, made in 1936, listed seven states in the third group. It now contains only three.

¹⁴ 38 Ida. 451, 221 P. 1107 (1923). The decision turns on what is now Ida. Code 1948, Tit. 16, Ch. 25, § 1601.

the presence of the parents in open court if they reside in the county but authorizes the acceptance of a formal written consent acknowledged before an authorized officer if they are non-residents thereof. Such an acknowledged consent had been presented to the court in that case at the time the adoption decree was granted but the record failed to disclose either that the parents were present in court or that they were non-residents. When the decree was subjected to attack some six months later by means of a petition for habeas corpus, the Idaho Supreme Court struck it down on the ground that the statutory provisions were mandatory in character and that strict compliance therewith was essential to establish jurisdiction. Exclusive of the holding therein, and in the instant case which adopts that reasoning, only one other reported case, that of *Martin v. Fisher*,¹⁵ can be found which deals with the point as to whether or not the consent requirements are mandatory ones.

There is ample authority, however, for what seems to be an established general rule that where an attempt is made to terminate the natural parent and child relationship and to substitute the adoptive status in its place, the statutes must be strictly construed and the specific requirements thereof must be strictly carried out.¹⁶ Aside from the fundamental concept that statutes in derogation of the common law should be strictly construed, the reasoning in support of the rule seems to stem from the fact that the rights of the natural parents, if not somehow forfeited, are to be regarded as paramount to those of other persons, hence are in need of such emphatic protection. Only in *Owles v. Jackson*,¹⁷ a leading Louisiana case, can it be said that the court found sufficient justification for its adherence to such general rule without making reference to these paramount rights of the natural parents, preferring to rest its decision on the fact that adoption, being a creature of the law, could be established only by strict compliance with the law. Although there is no authority contrary to this general rule, it should be noted that the unanimity of decision exists only where the effect of the granting of an adoption decree is to terminate the former parental relationship. If, then, there is no

¹⁵ 25 Ohio App. 372, 158 N. E. 287 (1927). Although the court there said that the statute was mandatory, it upheld an adoption decree based on a consent that was not acknowledged in statutory fashion by saying that the presumption of compliance was not overcome since the consent could have been given in some other manner.

¹⁶ In re McGrew, 183 Cal. 177, 190 P. 806 (1920); Vaughn v. Hubbard, 38 Ida. 451, 221 P. 1107 (1923); Green v. Paul, 212 La. 337, 31 So. (2d) 819 (1947); Zalis v. Ksyepka, 315 Mass. 479, 53 N. E. (2d) 104 (1944); In re Whitcomb, 271 App. Div. 11, 61 N. Y. S. (2d) 1 (1946); In re Holder, 218 N. C. 136, 10 S. E. (2d) 620 (1940); In re Rubin's Adoption, 6 Ohio Supp. 26 (1941); Adoption of Capparelli, 180 Ore. 41; 175 P. (2d) 153 (1946).

¹⁷ 199 La. 940, 7 So. (2d) 192 (1942).

such complete break, there may be occasion to doubt the force of such reasoning.¹⁸

There is no apparent compelling reason, then, why the Illinois court should see fit, in the instant case, to find the statute to be of mandatory character, for the statutory wording, although admitting of such construction, does not necessarily demand it.¹⁹ Perhaps the most favorable aspect of such a finding rests in the fact that it leaves no occasion for any doubt whatsoever as to the status of the Illinois law on the particular problem. In spirit, at least, the decision achieves a result in complete conformity with the majority attitude.

When the Illinois Appellate Court added that the natural parent had a right to retract the consent at any time before the petition for adoption had been acted upon by the trial court, it made a clearly unnecessary statement for, if the consent was invalid, there was nothing to retract. While the statement may bear scrutiny, it is in agreement with a rule once followed elsewhere but which, in the light of several recent cases, is undergoing considerable modification. A clear majority of the cases on the point do not question the right of a parent to withdraw a prior consent,²⁰ although there is some divergence of opinion as to just how long this right continues.²¹ At one time, only two minority cases

¹⁸ The Illinois statute, Ill. Rev. Stat. 1947, Ch. 4, § 5—1, does not purport to change the rule laid down in *Dwyer v. Dwyer*, 366 Ill. 630, 10 N. E. (2d) 344 (1937), noted in 16 CHICAGO-KENT REVIEW 198, concerning the duty owed to the child by the natural parent despite the fact that adoption has taken place. If that decision still stands, although based on a statute which was repealed at the time the present statute was enacted, the process of adoption in Illinois cannot be said to produce a complete termination in the parent-child relationship.

¹⁹ The repetition of the word "shall" in Ill. Rev. Stat. 1947, Ch. 4, § 3—6, may connote a legislative desire to insist upon technical compliance, but it has not always had that effect. Compare, for example, the language in Ill. Rev. Stat. 1947, Ch. 89, § 6a, regarding observance of eugenic provisions as a prerequisite to obtaining a license to marry, and the holding in *Boysen v. Boysen*, 301 Ill. App. 573, 23 N. E. (2d) 231 (1939), noted in 18 CHICAGO-KENT LAW REVIEW 206.

²⁰ In *re McDonnell's Adoption*, 77 Cal. App. (2d) 805, 176 P. (2d) 778 (1947); *Green v. Paul*, 212 La. 337, 31 So. (2d) 819 (1947); In *re Anderson*, 189 Minn. 85, 248 N. W. 657 (1933); *Wright v. Fitzgibbons*, 198 Miss. 471, 21 So. (2d) 709 (1945); *Application of Graham*, 239 Mo. 1036, 199 S. W. (2d) 68 (1947); In *re Cohen*, 155 Misc. 202, 279 N. Y. S. 472, 128 A. L. R. 1041 (1935); *State ex rel. Scholder v. Scholder*, 22 Ohio L. Rep. 608 (1944); *Paschke v. Smith*, 214 S. W. (2d) 205 (Tex. Civ. App., 1948); *State ex rel. Towne v. Sup. Ct. for Kitsap County*, 24 Wash. (2d) 441, 165 P. (2d) 862 (1946). While the case of *In re White's Adoption*, 300 Mich. 378, 1 N. W. (2d) 579, 138 A. L. R. 1034 (1942), allowed withdrawal where the parent had a change of mind, and is commonly cited as support for the general rule, the court clearly indicated that no vested rights had intervened.

²¹ Where there are special statutory periods before a final decree can be entered or within which a petition for rehearing can be filed, three states allow withdrawal until the end of that period: *Green v. Paul*, 212 La. 337, 31 So. (2d) 819 (1947); *Re White's Adoption*, 300 Mich. 378, 1 N. W. (2d) 579 (1942); In *re Burke's Adoption*, 60 N. Y. S. (2d) 421 (1946). Two states allow withdrawal until the instrument of consent is acted upon: *State ex rel. Scholder v. Scholder*, 22 Ohio L. Rep.

clearly held that a parent could not arbitrarily withdraw a prior consent without just cause.²² Several well-reasoned recent decisions, however, have held that the right to withdraw is not absolute and cannot be exercised out of the mere whim or caprice of the parent who has previously consented.²³ These cases subject the parental right of withdrawal to other equitable considerations such as those concerning the best interests of the child and those involving equities arising out of the bona fide acts of the persons seeking the adoption.

In the Kentucky case of *Lee v. Thomas*,²⁴ for example, an expectant mother signed a consent for the adoption of her illegitimate child prior to its birth, the adopting parents assuming responsibility for the medical expenses and the care and custody of the child. Some fifteen months later, when the adopting parents filed a petition for adoption, the natural mother appeared and sought to withdraw her consent. It was held that she could not bar the adoption by attempting to withdraw her consent after it had been acted upon and adoption proceedings had been instituted, especially so in view of the equities favoring the adopting parents and the evident service to the child by permitting the adoption.

There is occasion, then, to doubt if the court in the instant case did a service by taking a stand on a proposition which is far from settled at a time when such action was not squarely required of it for the purpose of settling the issues over which it was concerned.

H. H. BENEDICT

DAMAGES—GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES—WHETHER OR NOT PAYMENT FOR COVENANT NOT TO SUE, MADE BY ONE AGAINST WHOM TORT LIABILITY WOULD LIE, MAY BE USED TO MITIGATE DAMAGES IN SUIT AGAINST ANOTHER WHOSE TORT LIABILITY ARISES FROM SAME CIRCUMSTANCES—The plaintiff in *Aldridge v. Morris*¹ sued as ad-

608 (1944); *Paschke v. Smith*, 214 S. W. (2d) 205 (Tex. Civ. App., 1948). Three states allow it before decree or final approval: *Application of Graham*, 239 Mo. 1036, 199 S. W. (2d) 69 (1947); *Adoption of Capparelli*, 180 Ore. 41, 175 P. (2d) 153 (1946); *In re Nelms*, 153 Wash. 242, 279 P. 748 (1929).

²² *Re Adoption of a Minor*, 79 App. D. C. 191, 144 F. (2d) 644, 156 A. L. R. 1001 (1944), a case of questionable authority because based on special statutory provisions, and *Wyness v. Crowley*, 292 Mass. 461, 198 N. E. 758, 138 A. L. R. 1041 (1935).

²³ *Skaggs v. Gannon*, 293 Ky. 795, 170 S. W. (2d) 12 (1943); *Lee v. Thomas*, 297 Ky. 858, 181 S. W. (2d) 457 (1944); *Kalika v. Munro*, — Mass. —, 83 N. E. (2d) 171 (1948); *Erickson v. Raspperry*, 300 Mass. 333, 69 N. E. (2d) 474 (1946); *Adoption of Capparelli*, 180 Ore. 41, 175 P. (2d) 153 (1946). The case of *French v. Catholic Community League*, 69 Ohio App. 422, 44 N. E. (2d) 113 (1943), does not follow the earlier Ohio cases for it indicates that the right to withdraw is conditional.

²⁴ 297 Ky. 858, 181 S. W. (2d) 457 (1944).

¹ 337 Ill. App. 369, 86 N. E. (2d) 143 (1949). Leave to appeal has been denied.

ministratrix to recover for the wrongful death of the decedent arising in a collision between a car driven by the defendant, in which the decedent rode as a guest, and a truck driven by an employee of an oil company. Prior to suit, the administratrix had accepted a substantial sum from the oil company in return for a covenant not to sue. The trial jury, over objection, was allowed to hear evidence concerning the payment for the covenant not to sue. Despite this, it found that defendant, while negligent, was not wilfully or wantonly so, as is required before a non-paying guest can recover from the driver,² and judgment passed for defendant. On plaintiff's appeal therefrom, the lower court judgment was upheld by the Appellate Court for the Second District on the ground that (1) the evidence concerning the covenant not to sue was admissible, and (2) the finding of the jury in defendant's favor was not contrary to the weight of the evidence. The opinion of the court, written by Bristow, J., considered the fundamental issue to be "whether the covenant not to sue, entered into between plaintiff and the oil company should have been introduced in the proceedings." After a thorough analysis of the Illinois cases in point, the court noted that Illinois decisions have been cited as authority on both sides of the question,³ found that unimportant factors have been used as bases for some of the decisions, and came to a well-reasoned conclusion that such factors were without sound support and should not be followed.

That a release given to one of two or more joint tort feorsors will serve to release all is well settled.⁴ Difficulty arises, however, in determining whether the consideration furnished by one of the tort feorsors was given for a release or merely for a covenant not to sue.⁵ As the latter does not serve to bar suit against the remaining tort feorsors,⁶ a number of states, including Illinois,⁷ have held that the intention of the parties is controlling on the point.⁸ Once it has been ascertained that the agreement made is actually a covenant not to sue, the problem of the instant case will arise, that is what should be the effect of such a covenant upon the covenanter's action against a third person whose tort liability grows out of the same circumstances?

² Ill. Rev. Stat. 1947, Ch. 95½, § 58a.

³ See annotation in 104 A. L. R. 926 to the New Jersey case of *Brandstein v. Ironbound Transportation Co.*, 112 N. J. L. 585, 172 A. 580 (1934), particularly pp. 932 and 941.

⁴ *Mooney v. City of Chicago*, 239 Ill. 414, 88 N. E. 194 (1909); *Welty v. Laurent*, 285 Ill. App. 13, 1. N. E. (2d) 577 (1936). In general, see 23 R. C. L. Release, §§ 35-6, and 66 A. L. R. 206.

⁵ See note in 79 U. of Pa. L. Rev. 503 (1930).

⁶ 45 Am. Jur., Release, § 4.

⁷ *Chicago & Alton Ry. Co. v. Averill*, 224 Ill. 516, 79 N. E. 654 (1906); *Reams v. Janoski*, 268 Ill. App. 8 (1932).

⁸ 45 Am. Jur., Release, § 37.

In the settlement of that problem, it may be noted that the great weight of authority in this country holds that evidence concerning the consideration received for the covenant not to sue may be introduced in evidence in a suit against the other joint tortfeasor and the jury may be instructed to deduct, from any award made to plaintiff, the amount so received.⁹ A fair number of the Illinois decisions fall in line with this majority view, commencing with the case of *City of Chicago v. Babcock*.¹⁰ Actually, the court there decided that a jury finding to the effect that a purported release was really a covenant not to sue was binding, hence did not serve to exculpate the defendant. By way of comment, however, the court remarked that the moneys paid for such a covenant might well be used to reduce the amount of damages assessed against the other joint tortfeasor. Whether the jury did or did not so consider the covenant was not questioned. Ten later Illinois decisions, more than a proportionate share of the cases on the subject, have picked up and applied the dictum so pronounced.¹¹

Decisions which adhere to the opposite view base the refusal to allow evidence of the covenant to be offered in mitigation on a variety of grounds. The first view, really a reiteration of the prevailing viewpoint, becomes operative whenever the court finds that the party furnishing the con-

⁹ McKenna v. Austin, 134 F. (2d) 659 (1934); Steenhuis v. Holland, 217 Ala. 105, 115 So. 2 (1927); Storey v. Breedman, 5 Alaska 468 (1916); Dwy v. The Connecticut Co., 89 Conn. 74, 92 A. 883 (1914); Ballick v. Philadelphia Products Co., Inc., 5 Harr. 74, 162 A. 776 (Del., 1932); Caplan v. Caplan, 62 Ga. App. 577, 9 S. E. (2d) 96 (1940); Parry Mfg. Co. v. Crull, 56 Ind. App. 77, 101 N. E. 756 (1913); Miller v. Beck, 108 Iowa 601, 79 N. W. 344 (1899); Louisville Gas & Electric Co. v. Beaucond, 188 Ky. 725, 224 S. W. 179 (1920); McCrillis v. Hawes, 38 Me. 566 (1854); Bogdahn v. Pascagoula St. Ry. & Power Co., 118 Miss. 668, 79 So. 844 (1918); Karcher v. Burbank, 303 Mass. 303, 21 N. E. (2d) 542 (1939); Knoles v. Clark, 236 Mo. App. 1162, 163 S. W. (2d) 369 (1942); Meinecke v. Intermountain Trans. Co., 101 Mont. 315, 55 P. (2d) 680 (1936); Mason v. Stephens, 163 N. C. 370, 84 S. E. 527 (1915); Colby v. Walker, 86 N. H. 568, 171 A. 774 (1934); Lombardo v. Creamer, 113 N. J. L. 117, 172 A. 584 (1934); Fidel v. Brooklyn & Queens Transit Corp., 242 App. Div. 791, 274 N. Y. S. 796 (1934); Adams Express Co. v. Beckwith, 100 Ohio St. 348, 126 N. E. 300 (1919); City of Tulsa v. McIntosh, 90 Okla. 50, 215 P. 624 (1923); McKay v. Pacific Bldg. Materials Co., 156 Ore. 578, 68 P. (2d) 127 (1937); Hunt v. Aufderheide, 330 Pa. 362, 199 A. 345 (1938); Finlay v. Plante, 52 R. I. 325, 160 A. 865 (1932); Bradshaw v. Baylor University, 126 Tex. 99, 84 S. W. (2d) 703 (1935); Chamberlin v. Murphy, 41 Vt. 110 (1868); Stusser v. Mutual Union Ins. Co., 127 Wash. 449, 221 P. 331 (1923); Natrona Power Co. v. Clark, 31 Wyo. 284, 225 P. 586 (1924); New River & Pocahontas Cons. Coal Co. v. Eary, 115 W. Va. 46, 174 S. E. 573 (1934); Abraham v. Clark, 202 Wis. 451, 232 N. W. 865 (1930).

¹⁰ 143 Ill. 358, 32 N. E. 271 (1892).

¹¹ Garvey v. Chicago Railways Co., 339 Ill. 276, 171 N. E. 271 (1930); Bejnarowicz v. Bakos, 332 Ill. App. 151, 74 N. E. (2d) 614 (1947); Stoewsand v. Checker Taxi Co., 331 Ill. App. 192, 73 N. E. (2d) 4 (1947); Rather v. City of Chicago, 298 Ill. App. 625, 19 N. E. (2d) 451 (1939); Gore v. Henrotin, 161 Ill. App. 110 (1911); Chicago & Alton Ry. Co. v. Averill, 127 Ill. App. 275 (1906); Brennan v. Electric Installation Co., 120 Ill. App. 461 (1905); City of Chicago v. Smith, 95 Ill. App. 335 (1900); Chicago & E. I. Ry. Co. v. Hines, 82 Ill. App. 488 (1898), affirmed in 183 Ill. 482, 56 N. E. 177 (1899), without comment upon point in question.

sideration and the party being sued are not, in fact, joint tort feors¹² but are independent actors.¹³ As the general rule allowing mitigation is designed to apply only where joint liability is involved, that rule is clearly inappropriate for use in such cases. Three of the Illinois cases have been decided squarely on this proposition. In *Scharfenstein v. Trust City Knitting Company*,¹⁴ for example, mitigation was disallowed when it appeared that the parties concerned were not joint tort feors, albeit the court said that even joint tort feors were not entitled to mitigation. In *Skillman v. McDowell*,¹⁵ a proceeding under the Dram Shop Act,¹⁶ the dram shop keeper was denied an opportunity to show that the plaintiff, his customer, had received money from another patron for a covenant not to sue because the defendant's liability was treated as being distinct and separate from that of the patron.¹⁷ As recently as 1948, the Illinois Supreme Court, in the case of *McManaman v. Johns-Manville Products Corporation*,¹⁸ also disallowed mitigation on much the same grounds, treating the parties concerned as not being joint tort feors.

Other cases which refuse to allow mitigation do so on the ground that the granting of a covenant not to sue is purely a personal matter between the immediate parties with no portion of the transaction inuring to the benefit of another. As such parties are to be fully protected in their right to make any lawful contract they please, it has been conceived that their intention is to regard the sum paid for the covenant as not being designed to satisfy any part of the plaintiff's claim against the defendant. The intention so discovered has, as a necessary concomitant to the premise on which it is based, been enforced in cases such as *Nashland Interurban Railway Company v. Gregory*.¹⁹ A Minnesota court, in an erroneous belief that such view had been applied "in a multitude of cases,"²⁰ wherein full recovery had been granted against the other person jointly liable, saw fit to follow the Tennessee view so expressed. In direct opposition to the

¹² That the rule as to just what parties are joint tort feors is not settled, see Prosser, "Joint Torts and Several Liability," 25 Cal. L. Rev. 413 (1937).

¹³ Payments made by employer to plaintiff-employee have been excluded in *Town of West Hartford v. Willets*, 125 Conn. 268, 5 A. (2d) 13 (1929); *Gulf Refining Co. v. Jackson*, 250 S. W. 1080 (Tex. Civ. App., 1923); *Grimm v. Globe Printing Co.*, 232 S. W. 676 (Mo. App., 1921).

¹⁴ 253 Ill. App. 190 (1929).

¹⁵ 317 Ill. App. 85, 45 N. E. (2d) 574 (1942).

¹⁶ Ill. Rev. Stat. 1947, Ch. 43, § 94 et seq.

¹⁷ But see *Manthei v. Heimerdinger*, 332 Ill. App. 335, 75 N. E. (2d) 132 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 358, to the effect that such distinction does not hold true where a general release is given.

¹⁸ 400 Ill. 423, 81 N. E. (2d) 137 (1948).

¹⁹ 137 Tenn. 422, 193 S. W. 1053 (1917).

²⁰ *Musolf v. Duluth Edison Electric Co.*, 108 Minn. 369 at 378, 122 N. W. 499 at 503 (1909).

attitude that the covenant is a matter of concern solely to the contracting parties, is the viewpoint expressed in a few cases which hold that the defendant may not only take advantage, by way of mitigation, of the consideration given for the covenant when paid by a joint tortfeasor but may also use proof of money paid by independent tortfeasors and even by persons not, in fact, liable.²¹ As a Utah court recently stated that concept, it would ill become "one who has forced another to pay him damages for injuries he has received to argue that he did so in bad faith,"²² hence he must allow proof of such payments in favor of all others involved.

Relatively few cases have considered the impact such evidence might have upon the jury. In the Nebraska case of *Tankersley v. Lincoln Traction Company*,²³ it was the defendant who objected to the introduction of evidence concerning amounts received by the plaintiff for a covenant not to sue, despite the fact that such proof would seemingly redound to its benefit. The court agreed with the objection, holding that it was error to allow such proof in evidence because it would be apt to cause the jury to "assume that the non-settling defendant was liable for the same amount of damages."²⁴ The logic would seem unsound, but it is reflected in the Illinois case of *Devaney v. Otis Elevator Company*,²⁵ often cited as evidencing an adherence to the minority view, where the court said that, inasmuch as the covenantee was not a party to the suit, it was improper for the jury to consider the effect of any agreement it might have made with the plaintiff. It may be noted, however, that no reversal was granted therein for the instruction was not regarded as prejudicial to a defendant who would stand to benefit from that proof.²⁶ The point does not seem to have been pressed too strongly and the ultimate decision may be justified on the ground that the covenantee, who was the plaintiff's employer, was not really a joint tortfeasor.

The decision in the instant case attempts to place the Illinois law on a sound basis, squaring it with the weight of authority. The only distracting feature lies in the fact that the whole discussion is beside the point for the jury found that the defendant had not acted in the

²¹ *Husky Refining Co. v. Barnes*, 119 F. (2d) 715 (1941); *Young v. Anderson*, 33 Ida. 522, 196 P. 193 (1921); *Jacobsen v. Woerner*, 149 Kan. 598, 89 P. (2d) 24 (1939); *Bailey v. Delta Elec. Light, Power & Mfg. Co.*, 86 Miss. 634, 38 So. 354 (1905); *El Paso & S. R. Co. v. Darr*, 93 S. W. 166 (Tex. Civ. App., 1906).

²² *Green v. Lang Co., Inc.*, — Utah — at —, 206 P. (2d) 626 at 627 (1949).

²³ 101 Neb. 578, 163 N. W. 850 (1917).

²⁴ 101 Neb. 578 at 584, 163 N. W. 850 at 852.

²⁵ 251 Ill. 28, 95 N. E. 990 (1911).

²⁶ Much the same rationale appears to have been followed in *Caruso v. City of Chicago*, 305 Ill. App. 571, 27 N. E. (2d) 545 (1940), and in *Onyschuk v. Sharkey*, 277 Ill. App. 414 (1934), where the court felt that the defendant had the benefit of the proof even though no special instruction was given on the point.

willful and malicious fashion necessary to support a recovery. As the court approved that finding, it follows that plaintiff could recover nothing from the defendant. Being without such right of recovery, there could never be damages assessed against the defendant from which to deduct the money plaintiff received for his covenant not to sue. The question of the effect of such covenant, then, was not before the court for purpose of comment.

E. A. WARMAN

DIVORCE—OPERATION AND EFFECT OF DIVORCE AND RIGHTS OF DIVORCED PERSONS—WHETHER A DIVORCE DECREE BY COURT HAVING PERSONAL JURISDICTION OF BOTH PARTIES ABROGATES A PRIOR SEPARATE MAINTENANCE DECREE OF ANOTHER STATE—That *Sherrer v. Sherrer*¹ and *Coe v. Coe*² have done little to clarify the question of the effect of an out of state divorce on a local separate maintenance decree is the disappointing conclusion to be drawn from two recent cases. One of these cases, that of *Buck v. Buck*,³ came before the Illinois Appellate Court for the First District. It appeared therein that, for some twenty years prior to 1943, Lillian Buck and Gordon Buck had lawfully cohabited as husband and wife in Illinois. In that year, Lillian obtained a decree of separate maintenance from an Illinois court on the ground of her husband's willful desertion. The following year, he went to Nevada, remained the required six weeks, and filed a divorce action charging extreme cruelty. His wife followed him to Nevada and filed a sworn answer as well as a cross complaint for divorce alleging desertion. The Nevada court awarded the decree to Lillian, approving a property settlement which had been arranged by the parties and a support allowance. Both parties returned to Illinois. Lillian thereafter filed a petition seeking an increase in the monthly award under the prior Illinois decree. The ex-husband, as a defense to that action, raised the effect of the Nevada proceeding and of Lillian's participation therein. Lillian's reply questioned the jurisdiction of the Nevada court and alleged that fraud had been practiced upon that court and upon her by the defendant. Upon appeal from a decree adverse to Lillian, the Illinois Appellate Court affirmed, holding that the requirements of full faith and credit, as laid down in the *Sherrer* and *Coe* cases, precluded any collateral attack upon the Nevada decree inasmuch as the defendant therein had filed an appearance and had submitted to the jurisdiction of that court, thereby nullifying the operation of the earlier Illinois decree.

1 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429, 1 A. L. R. (2d) 1355 (1948).

2 334 U. S. 378, 68 S. Ct. 1094, 92 L. Ed. 1451, 1 A. L. R. (2d) 1376 (1948).

3 338 Ill. App. 179, 86 N. E. (2d) 415 (1949).

In the other case, that of *Lynn v. Lynn*,⁴ the Appellate Division of the New York Supreme Court, two justices dissenting, reached an opposite result on somewhat similar facts. Jay Lynn, having been an unsuccessful defendant in a New York bed and board suit, went to Nevada to establish residence and filed a divorce suit against his wife Lillian charging cruelty. Lillian followed, filed an answer denying the allegations of cruelty and questioning the genuineness of her husband's Nevada residence. By way of a separate defense, she set up the prior New York adjudication. The Nevada court found for the husband and entered a decree of divorce in his favor, omitting therefrom any reference to support. Both parties returned to New York. Payments under the bed and board separation were continued for some five years. At that time, Lillian applied to the New York court for an increase in the payments. As a defense to that action, Jay pleaded the Nevada divorce and Lillian's participation therein. This defense was sustained by the trial court but, on appeal, the Appellate Division reversed, holding that the ex-wife's appearance in the Nevada divorce proceeding did not destroy her right to support under the earlier New York decree.

The problem evidenced in these two cases is not a new one. During the comparatively tranquil reign of *Haddock v. Haddock*,⁵ under which each state was left to determine for itself the effect an out of state divorce would have on its residents, it became generally recognized that, where both parties appeared in the out of state divorce proceeding before a court of competent jurisdiction, such decree was not subject to collateral attack.⁶ Where a prior decree for separate maintenance was involved, however, the result was not so clear. If the wife had previously obtained a separate maintenance decree in one state and later personally appeared in her spouse's out of state divorce action, a question would arise as to whether she had thereby lost her right to separate maintenance under the earlier decree. Some states held that she did.⁷ This result was reached, in some jurisdictions, even where the out of state divorce was of ex parte

⁴ 275 App. Div. 269, 88 N. Y. S. (2d) 791 (1949). Cohn, J., wrote a dissenting opinion, concurred in by Van Voorhis, J.

⁵ 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1 (1906).

⁶ See collection of cases in the annotation to *Chanblin v. Chanblin*, 362 Ill. 588, 1 N. E. (2d) 73 (1936), in 104 A. L. R. 1183, and *Guggenheim v. Wahl*, 203 N. Y. 390, 96 N. E. 726 (1910); *Strauss v. Strauss*, 122 App. Div. 729, 107 N. Y. S. 842 (1907); *French v. French*, 74 Misc. 626, 131 N. Y. S. 1053 (1911).

⁷ *Bloedorn v. Bloedorn*, 76 F. (2d) 812 (1935); *Rosa v. Rosa*, 296 Mass. 271, 5 N. E. (2d) 417 (1936); *Scheinwald v. Scheinwald*, 231 App. Div. 757, 246 N. Y. S. 33 (1930); *Richards v. Richards*, 87 Misc. 134, 149 N. Y. S. 1028 (1915); *Gilbert v. Gilbert*, 83 Ohio St. 265, 94 N. E. 421 (1911), reversed on other grounds in 108 N. E. 1121 (1911); *Comm. v. Parker*, 59 Pa. Super. 74 (1915).

character,⁸ although the general rule would seem to have been that an ex parte proceeding could have no such effect,⁹ the existence or non-existence of personal jurisdiction being deemed the determining factor.¹⁰ Other courts, by contrast, held that even a personal appearance by the wife and a plea to the merits would not waive her rights under the previous order.¹¹ The first federal clarification of the issue came with *Davis v. Davis*.¹² The Supreme Court, in that case, held that the wife's contest of her husband's Virginia divorce proceeding on the merits, even though termed a special appearance, he being properly domiciled in that state, had resulted in entitling the Virginia decree to full faith and credit in any action brought in another state.

Although the Davis case was a step in the right direction, conflicting state decisions thereafter evidenced that much remained to be done before uniformity could be attained. Nor did the two celebrated cases of *Williams v. North Carolina*¹³ offer a solution. While the effect of these cases was to require each state to give full faith and credit to a foreign ex parte divorce, if rendered on proper jurisdictional bases, it failed to determine the effect that divorce would have on personal obligations arising from the marital status such as the husband's duty to support.

Those states which sought to retain whatever was possible from the Haddock rule held that, where the wife had sought no affirmative relief under her personal appearance, the foreign decree could have no effect upon a prior separate maintenance decree¹⁴ although admitting that it would be conclusive if it incorporated a prior settlement,¹⁵ particularly

⁸ *Harrison & Saunders v. Harrison*, 20 Ala. 629 (1852); *Cardinale v. Cardinale*, 8 Cal. (2d) 762, 68 P. (2d) 351 (1937); *McCormick v. McCormick*, 82 Kan. 31, 107 P. 546 (1910); *McCullough v. McCullough*, 203 Mich. 288, 168 N. W. 929 (1918); *Herrick v. Herrick*, 55 Nev. 59, 25 P. (2d) 378 (1933).

⁹ *Basset v. Basset*, 141 F. (2d) 954 (1944); *Simonton v. Simonton*, 40 Ida. 751, 236 P. 863 (1925); *Miller v. Miller*, 200 Iowa 1193, 206 N. W. 262 (1925); *Dory v. Dory*, 248 Mass. 359, 142 N. E. 774 (1924); *Metzger v. Metzger*, 32 Ohio App. 202, 167 N. E. 690 (1929).

¹⁰ *Bennett v. Tomlinson*, 206 Iowa 1075, 221 N. W. 837 (1928); *West v. West*, 114 Okla. 279, 246 P. 599 (1926).

¹¹ *Harding v. Harding*, 198 U. S. 317, 25 S. Ct. 679, 49 L. Ed. 1066 (1905); *Lednum v. Lednum*, 85 Col. 374, 276 P. 674 (1929); *Kelly v. Kelly*, 118 Va. 376, 87 S. E. 567 (1916).

¹² 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A. L. R. 1518 (1938).

¹³ 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273 (1942), and 325 U. S. 229, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 (1945).

¹⁴ In *Manney v. Manney*, 42 Ohio L. Abs. 153, 59 N. E. (2d) 755 (1944), the court distinguished the case before it from the earlier case of *Gilbert v. Gilbert*, 83 Ohio St. 265, 94 N. E. 421 (1911), on the basis that no affirmative relief had been sought.

¹⁵ *Schacht v. Schacht*, 295 N. Y. 439, 68 N. E. (2d) 433 (1946); *Senor v. Senor*, 187 Misc. 856, 65 N. Y. S. (2d) 603 (1946), affirmed in 297 N. Y. 800, 78 N. E. (2d) 20 (1946); *In re Jarunek*, 267 App. Div. 607, 47 N. Y. S. (2d) 625 (1944); *Graham v. Hunter*, 266 App. Div. 576, 42 N. Y. S. (2d) 717 (1943).

so as to all parties who personally appeared.¹⁶ Closely associated with this line of cases are those which hold that, even after personal appearance, the jurisdictional question may be reopened if there is no positive finding of its existence by the out of state court.¹⁷ Other states, reaching a different result, held that the personal appearance of the defendant made the decree effective not only for all that was litigated but for all that might have been litigated, providing the court had proper jurisdiction of the res.¹⁸

The matter eventually came to the United States Supreme Court through the case of *Estin v. Estin*.¹⁹ The court there held, two justices dissenting, that an out of state ex parte divorce could have no effect on a prior separate maintenance decree of another state. That result was reached on the theory that no court, without personal jurisdiction, could determine personal rights and obligations. The principle of "divisible" divorce was thus laid down.²⁰ On the same day the court decided the *Estin* case, it handed down the decisions in the *Sherrer* and *Coe* cases.²¹ The problem was again essentially that of the *Estin* case except that there had been personal appearance by both parties in the out of state proceeding. Because of that personal appearance, the court held that any failure by the party defendant to contest the jurisdiction of the court was no one's fault but his own and that failure could not serve to provide the basis for a subsequent attack on the decree before the courts of a sister state. The doctrine of the *Davis* case, which had been interpreted as requiring a contest of jurisdiction,²² was thereby broadened and, insofar as it was in conflict with the holding in *Andrews v. Andrews*,²³ the latter case was expressly overruled.²⁴

It is not possible, at this time, to draw any decisive conclusions as to how state courts will apply the doctrines of the *Estin*, *Sherrer* and *Coe*

¹⁶ *Matter of Lindgren's Estate*, 293 N. Y. 18, 55 N. E. (2d) 849 (1944); *DeMarigny v. DeMarigny*, 193 Misc. 189, 81 N. Y. S. (2d) 228 (1948).

¹⁷ *Cohen v. Cohen*, 319 Mass. 31, 64 N. E. (2d) 689, 163 A. L. R. 362 (1946); *Giresi v. Giresi*, 137 N. J. Eq. 336, 44 A. (2d) 345 (1946); *Isserman v. Isserman*, 23 N. J. Misc. 174, 42 A. (2d) 642 (1945), reversed on other grounds in 138 N. J. Eq. 140, 46 A. (2d) 799 (1946).

¹⁸ *Ex parte Jones*, 249 Ala. 386, 31 So. (2d) 314 (1947); *Taylor v. Burdick*, 320 Mich. 25, 30 N. W. (2d) 418 (1948); *Keller v. Keller*, 352 Mo. 877, 179 S. W. (2d) 728 (1944).

¹⁹ 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561, 1 A. L. R. (2d) 1412 (1948).

²⁰ Mr. Justice Douglas noted that the "result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony." See 334 U. S. 541 at 549, 68 S. Ct. 1213 at 1218, 92 L. Ed. 1561 at 1569.

²¹ See notes 1 and 2, ante.

²² *Cohen v. Cohen*, 319 Mass. 31, 64 N. E. (2d) 689, 163 A. L. R. 362 (1946).

²³ 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366 (1903).

²⁴ See *Sherrer v. Sherrer*, 334 U. S. 343 at 353, 68 S. Ct. 1087 at 1092, 92 L. Ed. 1429 at 1437, 1 A. L. R. (2d) 1355 at 1363 (1948).

cases. Collectively they seem to lay down a middle road of decision which, if followed by state tribunals, would result in a greater degree of uniformity than has heretofore been the case, a result eminently desirable. Thus a state, although required by the Williams doctrine to give full faith and credit to an out of state ex parte divorce insofar as it operates upon the res, might properly assert its interest in the financial welfare of its own domiciliaries by a refusal to recognize such a decree as operative upon personal rights or liabilities of the party not present; a result consistent both with the Williams case and the holding in *Pennoyer v. Neff*.²⁵ To require recognition of a personal decree based upon personal appearance would seem to be a mere corollary of the rule rather than an unwarranted extension.

The Illinois court, in deciding the Buck case, adhered to these principles. While it must be admitted that Lillian Buck sought affirmative relief in the Nevada proceeding, her action was not made the basis of the decision. Quoting extensively from the Sherrer case, the Illinois court affirmed the principle that, where a court has personal jurisdiction of the parties and of the res, the result of that hearing will be res judicata not only concerning what was in fact litigated but also as to what might have been so litigated.²⁶ The Illinois court, therefore, felt bound to accord full faith and credit to the Nevada decree, a holding which, it is to be hoped, will become the accepted interpretation of the Sherrer and Coe cases.

The New York court, reaching the opposite result in the Lynn case, recognized the compelling effect of the Williams doctrine as to the full faith and credit which had to be accorded to the Nevada decree insofar as it affected the marital status, but seized upon the "divisible" divorce doctrine of the Estin case in order to prevent it from having any effect on the New York separate maintenance decree. In an effort to buttress the logic of that decision, the court leaned upon the fact that, there being no provision for support of the wife in the Nevada decree, that decree was not entitled to full faith and credit in New York because it had failed to give full faith and credit to the earlier New York decree. The court also relied upon the paramount interest of New York in the maintenance of the validity of its judgments as to matrimonial matters as well as the public policy of that state regarding divorce. In effect, the New York court said that, as the Estin case had given birth to the principle of divisible divorce, while it was constrained by the Williams case to recognize

²⁵ 95 U. S. 714, 24 L. Ed. 565 (1878).

²⁶ Ex parte Jones, 249 Ala. 386, 31 So. (2d) 314 (1947); *Godschalck v. Weber*, 247 Ill. 269, 93 N. E. 241 (1910); *Pratt v. Mridima*, 311 Mich. 64, 18 N. W. (2d) 279 (1945), cert. den. 326 U. S. 739, 66 S. Ct. 49, 90 L. Ed. 441 (1945); *Keller v. Keller*, 352 Mo. 877, 179 S. W. (2d) 728 (1944); *Morrissey v. Morrissey*, — N. J. Eq. —, 64 A. (2d) 209 (1949).

the effect of the decree on the marital status, there was nothing to compel it to accept that part of the decree which purported to operate in personam.

A blind following of the New York view would provide the impetus to turn an already confused problem into one of even greater confusion. Under it, no out of state divorce, despite complete jurisdiction both in rem and in personam, would be completely effective in a restrictive state of domicile of one of the parties. The litigant in such a suit, while everywhere recognized as divorced, would have to be, for purpose of the support of his ex-wife, regarded as a married person. Whether the forward-looking attitude of the Illinois court or New York's attempt to salvage whatever is left from the doctrine of the *Haddock* case will become the generally accepted attitude is a problem now in need of solution. Perhaps the only solution will be in another case of the import of *Williams v. North Carolina*.²⁷ It is appropriate, at least, to recall the prophesy Professor Holt made in 1943. He wrote: "Yet the bones of *Haddock v. Haddock* remain—unbleached and unpulverized . . . so courts in states that do not favor free and easy termination of marriage may still find in the ossious remains of the *Haddock* case material to fashion some puzzles for the Supreme Court of the United States to solve—puzzles upon which law students and their teachers in the meantime may speculate."²⁸

G. E. ELMORE

LANDLORD AND TENANT—TERMS FOR YEARS—WHETHER OPTION TO PURCHASE DEMISED PREMISES, CONTAINED IN LEASE FOR YEARS, IS EXTENDED BY VIRTUE OF EXERCISE OF OPTION TO RENEW SAME LEASE.—In the recent case of *Hindu Incense Manufacturing Company v. MacKenzie*,¹ the Illinois Supreme Court was called upon, for the first time, to determine whether an option to purchase, as contained in a lease, was continued into a renewal term by virtue of the exercise of an option to renew contained in the same lease.² The record showed that the lessee-plaintiff gave timely notice in writing to the lessor-defendant of its election to exercise the option to renew. During the renewal term the

²⁷ See note 13, ante.

²⁸ Holt, "The Bones of *Haddock v. Haddock*," 41 Mich. L. Rev. 1013 at 1036 (1943).

¹ 403 Ill. 390, 86 N. E. (2d) 214 (1949), affirming 335 Ill. App. 423, 82 N. E. (2d) 173 (1948).

² The pertinent provisions of the lease were: "To have and to hold . . . with mutual option to renew for an additional term of two years under the same terms and conditions." A separate clause stated: "An option is hereby given to the lessee to purchase the said premises for the sum of twenty-four thousand (\$24,000.00) dollars at any time during the term of this lease, free and clear of all encumbrances."

plaintiff, learning that the defendant was about to sell the property to a third person, notified the defendant that it had an option to purchase which would not expire until the end of the renewal term and that, if defendant sold, he would be depriving plaintiff of its right to purchase under the option. Plaintiff then filed a complaint in two counts, one for a declaratory judgment as to its rights, the other for an injunction. The proceedings were afterwards limited to count one upon which the trial court declared that the option to purchase had been renewed and continued when the plaintiff properly exercised its election to renew the tenancy. The Appellate Court for the First District affirmed that declaratory judgment and, on further appeal, the Supreme Court likewise affirmed. It reasoned that the language used in the lease was expressive of an intention by the parties that the exercise of the option to renew the lease "under the same terms and conditions" should also serve to carry the option to purchase over into the renewal term as an integral part of an indivisible contract.³ Such being the case, the court was then able to say that "the option to purchase was one of the terms of the lease and the option to renew clearly grants to the lessee the power to renew the entire contract upon the same terms as granted in the original undertaking."⁴

Whether an option to purchase can be exercised during a renewal term must, of course, depend upon the intention of the parties, which intention must be gathered from the lease itself.⁵ Where, however, the parties to the lease have not stipulated in precise terms on the point, courts are forced to formulate a rule of construction from which to achieve a decision. In arriving at such a rule, the first point to be considered is how the court is to regard the option to purchase in its relationship to the entire lease, that is whether to consider the option as an integral part of the lease or as an independent and collateral provision. The second consideration involves a determination as to whether the renewal term is to be considered part of one over-all leasing⁶ or is to be treated as a new lease.⁷

³ That an option is an integral part of an indivisible contract, see *Garlick v. Imgruet*, 340 Ill. 136, 172 N. E. 164 (1930).

⁴ 403 Ill. 390 at 395, 86 N. E. (2d) 214 at 216.

⁵ *Thompson v. Coe*, 96 Conn. 642, 115 A. 219 (1921); *Volunteers of America v. Spring*, 27 Ohio App. 229, 161 N. E. 215 (1927). See also 51 C. J. S., *Landlord and Tenant*, § 84.

⁶ *Underhill, Landlord and Tenant* (T. H. Flood & Co., Chicago, 1909), Vol. 2, § 803.

⁷ The court involved in *Ardito v. Howell*, — Del. — at —, 51 A. (2d) 859 at 861 (1947), however, felt that "it would be profitless and unrealistic to resolve this case by ascertaining whether the lease was 'extended' or 'renewed' or whether the option to purchase is part of a 'divisible' contract or is an 'independent' agreement." It believed that the "preferable practice would seem to be merely to consider the agreement as posing a problem of construction to ascertain intent to be resolved in the light of principles applicable to such a problem."

On the first of these points, a clear distinction appears to exist in the American decisions as to whether an option to purchase is an integral part of the contract or not. One view, treating the lease as being no different than any other contract, would give no greater significance to any one clause than to another or, to put the matter in converse fashion, would treat all clauses as possessing equal significance. Illustrating that view is the Maryland case of *Schaeffer v. Bilger*⁸ where the court treated the clauses giving the right to obtain a renewal and also to acquire the title as being indivisible parts of the one contract.⁹ It came to that conclusion through the aid of an earlier case, that of *Thomas v. G. B. S. Brewing Company*,¹⁰ which had treated the option feature as a "continual obligation" running with the lease much as would be the case of a covenant running with the land.¹¹ Something of the sort is indicated by the instant case, for the court stressed the fact that the renewal was to be under "the same terms and conditions" as appeared in the original lease, considering that statement as evidence of an intention that all terms, and not just some of them, should be renewed. It may be said that this view reflects the majority opinion on the subject but it is not without a respectable opposition.

The contrary view, one which treats the option to purchase as being an incidental and collateral term of a demise of land, is best illustrated by the Pennsylvania case of *Pettit v. Tourison*,¹² a case involving parallel facts to the instant case but one which reached an opposite result. That view is based on the concept that a lease is not, per se, a contract but is primarily a grant of an interest in land so that all things not essential to such grant are necessarily incidental thereto. As the court there stated, a privilege to renew and an option to purchase "confer separate rights and powers upon the lessee. The first has reference to the continuance of the tenancy; the latter confers upon the lessee the power to terminate the tenancy and to become the absolute owner of the property. The option to purchase is not an essential covenant of the lease, nor is it a term and condition of the demise. There are many covenants which are often found in leases which are independent and not essential parts of the demise which without express agreement to that effect are not to be incorporated in renewals thereof, such as a covenant to renew or any covenant that has been fulfilled and is not continuous."¹³

⁸ 186 Md. 1, 45 A. (2d) 775 (1946).

⁹ See also *Moore v. Maes*, — S. C. —, 52 S. E. (2d) 204 (1949).

¹⁰ 102 Md. 417, 62 A. 633 (1905).

¹¹ See *Starr v. Holck*, 318 Mich. 452, 28 N. W. (2d) 289 (1947), a case which adopts similar language.

¹² 283 Pa. 529, 129 A. 587, 39 A. L. R. 1106 (1925).

¹³ 283 Pa. 529 at 531, 129 A. 587 at 587-8.

The adherence there shown to the English views on the subject¹⁴ have not gone without notice in other parts of the country,¹⁵ but it is clear that even an incidental provision may be carried over into the renewal period if suitable language is used to designate that intention. Such being the case, is there not a more practical basis for the general view since leases today have lost many of the common law characteristics and have become more nearly simple contracts? The court in the instant case did not say that an option to purchase could not be in the form of an independent condition, but rather that if such was the intention it would have to be clearly so worded.

Under the second point, which requires consideration of whether the transaction is to be taken to consist of parts of an over-all leasing or whether the renewal term is to be regarded as a new leasing arrangement, a similar split of authority may be noted. If the transaction is to be given over-all effect, any provision in the original agreement will necessarily have to be carried forward into the renewal period unless that action is specifically forbidden. Attempts to discriminate between the "renewal of a lease" and the "extension of a term" have been rejected as a play on words in the absence of clear evidence that execution of a new lease for the additional period is required. The terms "renew" and "renewal" not being words of art possessing some special legal or technical significance,¹⁶ the general attitude has been to carry all covenants and conditions of the original lease forward to the extended period, if the option to extend is exercised.¹⁷ Here, again, there is evidence that a lease is to be treated as if it were no different than any other contract.

The contrasting view may be illustrated by the Pennsylvania case of *Pettit v. Tourison*,¹⁸ referred to above. The court there held that a provision for renewal could have reference only to the parts of the document which constituted the terms of the demise, terms that would, in case the option to renew was exercised, necessarily have to be carried forward into the continued tenancy. As the option to purchase the

¹⁴ See, for example, the words of Warrington, L. J., in *Sherwood v. Tucker*, [1924] 2 Ch. 440 at 446. He stated: "It has frequently been held and may be treated as perfectly well settled that an option of purchase is not to be regarded as a provision incident to the relation of landlord and tenant, but is a matter collateral to and independent of it." The case is noted in 23 Mich. L. Rev. 75.

¹⁵ *Carter v. Frakes*, 303 Ky. 244, 197 S. W. (2d) 436 (1946); *Mauzy v. Elliot*, 146 Neb. 865, 22 N. W. (2d) 142 (1946). Other Pennsylvania cases in point are *Parker v. Lewis*, 267 Pa. 382, 110 A. 79 (1920), and *Signor v. Keystone Consistory*, 227 Pa. 504, 121 A. 320 (1923).

¹⁶ *Flanagan v. Hambleton*, 54 Md. 222 (1880).

¹⁷ *McKown v. Heery*, 200 Ga. 819, 38 S. E. (2d) 204 (1946); *Meadow Heights Country Club v. Hinchley*, 229 Mich. 291, 201 N. W. 190 (1924); *Johnson v. Bates*, 128 N. J. Eq. 183, 15 A. (2d) 642 (1940); *Harvey Holding Co. v. Satter*, 297 N. Y. 113, 75 N. E. (2d) 619 (1947); *Masset v. Ruh*, 235 N. Y. 462, 139 N. E. 574 (1923).

¹⁸ 283 Pa. 529, 129 A. 587, 39 A. L. R. 1106 (1925).

premises was not there regarded to be of that category, the court said it had to be made to reappear as a term of the renewal lease through the use of suitable words if it was to survive the original term.¹⁹ The view would appear to be a logical extension of the original concept that a lease is primarily a grant and only incidentally a contract.

As long as courts start from different points of approach when dealing with the instant problem, there is little occasion for hope of effecting a reconciliation between these two views. Nor is the problem made simpler by reference to a hypothetical contractual intention which the parties themselves probably never possessed. At best, the subject can be said to reflect a more or less arbitrary treatment forced upon courts which are obliged to act in situations not competently covered by the parties. The present holding evidences a desire to side with the majority view, but it is a rather remarkable one in the light of earlier Illinois precedents which would indicate that an option to renew is not a present demise but is rather a covenant to grant an additional term²⁰ which, if exercised, results in a new lease.²¹ When an option to purchase is limited, as the one in the instant case was, to the "term of *this* lease,"²² it is a little illogical to treat the renewal of the tenancy as being a new leasing arrangement yet still somehow be able to carry over into it terms which were limited to the older one. If logic be cast aside in favor of uniformity, the decision has that much foundation to support it.

R. B. OGILVIE

NAMES—ASSUMED NAMES—WHETHER OR NOT CONTRACT MADE BY ONE WHO HAS FAILED TO COMPLY WITH STATUTE REGULATING USE OF AN ASSUMED NAME IS VALID AND ENFORCEABLE—The case of *Mickelson v. Kolb*¹ provides the first Illinois Appellate Court interpretation of the Illinois "assumed name" statute² so far as that statute may affect the enforceability of a contract made by one who has failed to comply with its terms. The plaintiff there, a duly licensed real estate broker, who had done business as the American Business & Realty Sales, brought an action in his own name to recover a brokerage commission allegedly earned under a contract with the defendant. Defendant moved to strike plaintiff's

¹⁹ See also *Sherwood v. Tucker*, [1924] 2 Ch. 440 at 445. Pollack, M. R., there said: "It is another matter altogether to say that the option is to continue for an extended period unless clear words are used for that purpose."

²⁰ *Fuchs v. Peterson*, 315 Ill. 370, 146 N. E. 556 (1925); *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560 (1884); *Hunter v. Silvers*, 15 Ill. 174 (1853).

²¹ *Vincent v. Laurent*, 165 Ill. App. 397 (1911).

²² 403 Ill. 390 at 391, 86 N. E. (2d) 214 at 215. Italics added.

¹ 337 Ill. App. 493, 86 N. E. (2d) 152 (1949).

² Ill. Rev. Stat. 1947, Ch. 96, § 4 et seq.

amended complaint and to dismiss the suit on the ground that plaintiff had violated the statute in question by failing to register his business name until after the action was begun. The trial court sustained defendant's motion and dismissed the action. On appeal, the Appellate Court for the First District affirmed such holding. It regarded the prohibition against a person doing business as a real estate broker without a license³ and the substantially similar prohibition in the statute in question as possessing equivalent effect. Since, without a broker's license, a broker could not recover a commission,⁴ the court said the same rule had to be applied to the instant case. The fact that the statute provided a penalty for its violation was said to make it one declaring the public policy of the state.

The view taken by the court announces a policy which is directly opposite to that heretofore followed in this state in the absence of a statute. At common law, it was the general rule that a person could adopt and use a business name other than his own and contracts entered into under that name were valid and enforceable.⁵ That attitude was so well understood that it was possible for the court, in the Illinois case of *Graham v. Eiszner*,⁶ to say: "It is well settled that any person may adopt any name, style or signature over which he may transact business and issue negotiable paper and execute contracts, wholly different from his own name, and may sue and be sued by such name, style or signature."⁷

But the common law right so enunciated has been subjected to statutory regulation in most of the states.⁸ Where found, these statutes generally provide that a person⁹ who wishes to do business under an

³ *Ibid.*, Ch. 114½, § 1. See also Municipal Code, Chicago, Ch. 113, § 23.

⁴ *Douthart v. Congdon*, 197 Ill. 349, 64 N. E. 348 (1902); *In re Estate of Katz*, 329 Ill. App. 442, 69 N. E. (2d) 25 (1946); *Hendricks v. Richardson*, 233 Ill. App. 130 (1924).

⁵ *Beilin v. Krenn & Dato, Inc.*, 350 Ill. 284, 183 N. E. 330 (1932); *The Union Brewing Co. v. The Interstate Bank & Trust Co.*, 240 Ill. 454, 88 N. E. 997 (1909).

⁶ 28 Ill. App. 269 (1888).

⁷ 28 Ill. App. 269 at 273.

⁸ No general provisions were to be found upon search of the statutes of Delaware, Florida, Kansas, Maryland, Mississippi, Nebraska, New Hampshire, New Mexico, South Carolina, Tennessee, Wisconsin and Wyoming. Statutes from other states are referred to in notes 12 to 19, *post*.

⁹ It is not deemed profitable to set out the application of the various statutes to different types of business units. The statutes usually designate whether they are to be applied to individuals, corporations, partnerships, or to the use of "& Company" following the names of individuals where that expression does not stand for actual partnerships. Section 7 of the Illinois act, Ill. Rev. Stat. 1947, Ch. 96, § 7, excludes domestic and foreign corporations, partnerships where the names of the partners are disclosed in the business name, and trusts.

assumed or fictitious business name¹⁰ must register such name by filing a certificate or affidavit with some appropriate public official¹¹ and may even require the publication of a notice of intent to use such business name.¹² Most states either expressly or impliedly require that such registration be a condition precedent to doing business under the name,¹³ or declare that "it shall be unlawful" to transact business in violation of the statute.¹⁴ Provisions are also made for the time of filing the certificate, the clerk's duty to keep an index of the names, the cancellation of the registration, and fees for the clerk's services.

The principal significant differences in these statutes are to be found in the penalty provisions. Upon examination, they will be found to fall into three groups. The first group¹⁵ declares a violation of the statute to be a misdemeanor, usually with some provision for a fine or for the imprisonment of the violator.¹⁶ The second group directs that persons doing business contrary to the provisions of the act shall not be permitted to maintain any action upon any contract made under an assumed name

¹⁰ For information concerning the types of names which have been classified as being fictitious or assumed, see annotation to *Kusnetzky v. Security Insurance Company*, 313 Mo. 143, 281 S. W. 47 (1926), in 45 A. L. R. 189 at 258, and to *Hayes v. Providence Citizens' Bank & Trust Co.*, 218 Ky. 128, 290 S. W. 1028 (1927), in 59 A. L. R. 450 at 459. See also 38 Am. Jur., Name, § 24, and 45 C. J., Names, § 13.

¹¹ Ill. Rev. Stat. 1947, Ch. 96, § 4, is typical. It provides that: "No person or persons shall hereafter conduct or transact business in this State under an assumed name . . . unless such person or persons shall file in the office of the County Clerk of the County in which such person or persons conduct or intend to conduct . . . business, a certificate setting forth the name under which the said business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons owning, conducting or transacting the same, with the post office address or addresses of said person or persons."

¹² Publication is required by *Deering Cal. Civ. Code* 1941, § 4468; *Ga. Code* 1933, Tit. 106, § 303, as amended by *Ga. Laws* 1937, p. 805; *Mont. Rev. Code* 1935, Ch. 158, § 8020; *N. D. Rev. Code* 1943, § 45-0229; *Okla. Stat. Ann.*, Tit. 54, § 83; *Purdon's Pa. Stat. Ann.*, Tit. 54, § 28.4 et seq.

¹³ An exception thereto is to be found in *Ala. Code* 1940, Tit. 12, § 230, which calls for registration of the name within ten days after written demand therefor has been made by any creditor. Until then, the common law rule is in full effect: *Jordan Undertaking Co. v. Asberry*, 230 Ala. 97, 159 So. 681 (1935).

¹⁴ See particularly *Iowa Code* 1946, Ch. 547.4; *Mo. Rev. Stat. Ann.*, Art. 3, § 15469; *S. D. Code* 1939, Ch. 49, §§ 49.0802 and 49.9901.

¹⁵ Illinois is included therein. Ill. Rev. Stat. 1947, Ch. 96, § 8, declares failure to comply shall be a misdemeanor punishable by fine or imprisonment for each day the violation continues.

¹⁶ *Ala. Code* 1940, Tit. 14, § 230; *Ark. Stat.* 1947, Tit. 70, § 405; *Conn. Gen. Stat.* 1949, Vol. 3, § 6728; *Ga. Code* 1933, Tit. 106, § 303, as amended by *Ga. Laws* 1937, p. 805; *Burns' Ind. Stat. Ann.* 1933, § 50-203; *Iowa Code* 1946, Ch. 547.4; *Ky. Rev. Stat.* 1948, § 365.990; *Dart La. Gen. Stat.* 1939, § 6507; *Me. Rev. Stat.* 1944, Ch. 167, § 8; *Mass. Ann. Laws*, Ch. 110, § 5; *Mo. Rev. Stat. Ann.*, Art. 3, § 15469; *N. C. Gen. Stat.* 1943, Ch. 59, § 88; *N. J. Stat. Ann.*, Tit. 56:1-4; *McKinney Cons. Laws N. Y. Ann.*, Penal Law, §§ 440(6) and 440-b(5); *R. I. Gen. Laws* 1938, Ch. 386, § 4; *Vernon's Tex. Penal Code Ann.*, Ch. 7, Art. 1070; *Utah Code Ann.* 1943, Tit. 58, Ch. 2; *W. Va. Code Ann.* 1943, § 4658.

until the certificate is filed.¹⁷ The third combines the provisions of the other two.¹⁸ In three states there is a further provision to the effect that failure to file the required certificate shall be deemed prima facie evidence of fraud in the securing of credit.¹⁹

Courts bound by statutes falling within the first group, as was true of the one in the instant case, were soon faced with a question as to whether or not the penalty provided by the statute was, of itself, sufficient to accomplish the legislative design or whether the additional penalty of the loss of right to enforce any contract made in violation of the statute was to be implied.²⁰ These courts approached the problem as being primarily one of statutory interpretation calling for an ascertainment of legislative intent, to be gathered from the language of the statute as read in the light of the circumstances with which it deals.²¹ The first consideration was the purpose of the statute. On this point, the courts generally agreed that the statutory object was to protect the public by giving information concerning the persons with whom they might deal as well as to afford protection against fraud and deceit in obtaining credit.²² But this agreement did not extend to the question of whether this purpose required a strict enforcement of the statute. Here two conflicting views grew up, one allowing the violator the right to enforce his contract, the other denying that right.

New York was among the states which, at an early time, adopted the principle of recovery despite the violation. In the case of *Wood v. Erie Railway Company*,²³ the court declared that a wrongdoer was not to be protected in the invasion of the rights of another merely because that other happened to be transacting business in violation of a special statute.

¹⁷ Ariz. Code 1939 § 58-202; Deering Civ. Code Cal. 1941, § 4468; Mont. Rev. Code Ann. 1935, Ch. 158, § 8020; N. D. Rev. Code 1943, Tit. 45-0229; Page's Ohio Gen. Code, § 8104; Okla. Stat. Ann., Tit. 54, § 83; Remington's Wash. Rev. Stat. Ann., Ch. 2, § 9980.

¹⁸ Colo. Stat. Ann. 1935, Ch. 165, § 22; Ida. Code 1948, Tit. 53-506-7; Mich. Stat. Ann., § 19.827; Minn. Stat. Ann., § 333.13; Nev. Comp. Laws 1929, §§ 4456-7; Ore. Comp. Laws Ann., Ch. 5, §§ 43-506-7; Purdon's Pa. Stat. Ann., Tit. 54, §§ 28.4 and 28.12; S. D. Code 1939, Ch. 49, §§ 49.0802 and 49.9901; Vt. Stat. 1947, Ch. 270, §§ 6114-9; Va. Code 1942, Ch. 185, § 4722(3). The Vermont statute, § 6111, also provides that persons doing business contrary to the act may be enjoined therefrom by a court of chancery.

¹⁹ Ida. Code 1948, Tit. 53-506; Ore. Comp. Laws Ann., Ch. 5, § 43-506; Remington's Wash. Rev. Stat. Ann., Ch. 2, § 9980.

²⁰ Courts have generally agreed that the innocent party may enforce the contract against the person who has failed to comply with the statute; *Kozy Theater Co. v. Love*, 191 Ky. 595, 231 S. W. 249 (1921), and *Springer v. Fuller*, 196 Mich. 628, 162 N. W. 973 (1917). Validity and enforceability, as used here, refers only to the violator's right.

²¹ See *Sagal v. Fylar*, 89 Conn. 293 at 298, 93 A. 1027 at 1028 (1915).

²² In general, see annotation in 45 A. L. R. 203, and 38 Am. Jur., Name, § 14.

²³ 72 N. Y. (27 Sickels) 196 (1878).

The case of *Gay v. Siebold*²⁴ held that an obligor could not plead the statute as a defense to an action on a bond brought by the violator of the statute, the court there saying that: "No one was deceived, and there was no possibility that any of the parties to the bond could be imposed on or harmed by the false designation. To indict and punish the plaintiffs for a crime in such a case would be most absurd and would shock the common sense, and the sense of justice of every right thinking person."²⁵ Connecticut agreed with this policy, saying that the purpose of the statute "obviously was not to provide a means by which persons having received a benefit from another should be enabled to retain it without compensation and to repudiate any agreement for compensation."²⁶ Other courts also believed that the defendant should not be allowed to use the statute as a means of escaping payment.²⁷

Taking the lead in the view that such contracts are unlawful and unenforceable was the Michigan case of *Cashin v. Pliter*.²⁸ That was an action brought by a construction company to collect the balance due on a contract under which it had built a house for defendant. Verdict in the trial court was directed for the defendant, on the ground that the contract was void because of the statutory violation, and on appeal that ruling was affirmed. The court there said that the "general rule is well settled that, where statutes enacted to protect the public against fraud or imposition, or to safeguard the public health or morals, contain a prohibition and impose a penalty, all contracts in violation thereof are void."²⁹ The Virginia case of *Colbert v. Ashland Construction Company*,³⁰ also a case in which the violator attempted to recover an unpaid balance on a construction contract, led to a denial of recovery because it was felt that courts were "established to afford remedies to litigants who seek relief growing out of lawful transactions, and not to aid those who would invoke their assistance to enforce contracts made in violation of law."³¹

The rule of the *Cashin* case has been adopted by other courts which likewise believed that the violator should be deprived of his remedy,³² but

²⁴ 97 N. Y. (52 Sickels) 472 (1884).

²⁵ 97 N. Y. (52 Sickels) 472 at 477.

²⁶ *Sagal v. Fylar*, 89 Conn. 293 at 298, 93 A. 1027 at 1028 (1915).

²⁷ *Wolf v. Youbert*, 45 La. App. 1100, 13 So. 806 (1893); *Lipman v. Thomas*,—Me.—, 61 A. (2d) 130 (1948); *Huey v. Passarelli*, 267 Mass. 578, 166 N. E. 727 (1929); *Viracola v. Comm'rs of City of Long Branch*, 1 N. J. Misc. 200, 142 A. 252 (1923).

²⁸ 168 Mich. 386, 134 N. W. 482 (1912).

²⁹ 168 Mich. 386 at 389, 134 N. W. 482 at 483.

³⁰ 176 Va. 500, 11 S. E. (2d) 612 (1940).

³¹ 176 Va. 500 at 509, 11 S. E. (2d) 612 at 616.

³² The following cases have particularly cited the rule of the *Cashin* case with approval: *Hunter v. Big Four Auto Co.*, 162 Ky. 778, 173 S. W. 120 (1915); *Courtney v. Packer*, 173 N. C. 479, 92 S. E. 324 (1917); *Beamish v. Noon*, 76 Ore. 415, 149 P. 522 (1915); *Bristol v. Noble Oil & Gas Co.*, 273 S. W. 946 (Tex. Civ. App., 1925).

some courts have taken a far-sighted view and have chosen to distinguish between the types of statutory violation to which such general rules should be applied. In this category is the case of *Kusnetzky v. Security Insurance Company*³³ wherein the court pointed out that the general rule referred to in the *Cashin* case, one which denied recovery on contracts made in violation of statute, had been adopted in cases where the contract called for the performance of an unlawful act, such as gambling, the sale of lottery tickets, the illegal leasing of premises for use as a bawdy house and the like, and should not be made to apply to the moral and harmless act of transacting an otherwise lawful business under an assumed name. The court there said that, if the defendant's contentions were correct, then one "could buy on credit a car from the Capital Motor Company; he could get his gasoline and have his car repaired at the Efficiency Garage; he could get his groceries at Delmonico, his ice cream at the Purity Ice Cream Company, his clothing at the Golden Eagle Clothiers, his milk from the Model Dairy, his bread at the Home Bakery; and, after having worn out and eaten all the stuff thus acquired without paying for it, he could defeat all suits brought to recover pay because those names had never been registered. And a person who would engage in that enterprise would be, by defendant's code, a righteous citizen, enforcing the law because he was guilty of the most nefarious frauds!"³⁴ The same statement might well be made concerning the defendant in the instant case if, in fact, the plaintiff had rendered the alleged service and defendant's refusal to pay rested on no other ground than the statutory violation.

When the harshness of decisions like those in the *Cashin* and *Colbert* cases was felt in states following the no-recovery rule, there was a demand for the development of a more equitable policy. Courts began to feel that the statute "was not intended to produce a confiscation of property, nor to relieve debtors from their honest obligations."³⁵ They began to distinguish the former rule, as has been done in the *Kusnetzky* case, by saying that it applied to acts which were *malum in se* and not *malum prohibitum*, hence would not apply it where the contract was not immoral or otherwise illegal.³⁶ To state the point differently, they felt that there was nothing inherently vicious about the act of doing business under an

³³ 313 Mo. 143, 281 S. W. 47 (1926). The defendant insurance companies there attempted to avoid payment to plaintiff under certain fire insurance policies because plaintiff had entered into the policies in an unregistered name. Recovery was permitted.

³⁴ 313 Mo. 143 at 155, 281 S. W. 47 at 50.

³⁵ *Engle v. Capital Fire Ins. Co. of Concord*, 75 Pa. Super. 390 at 397 (1921).

³⁶ *Humphry v. City National Bank of Evansville*, 190 Ind. 293, 130 N. E. 273 (1921).

assumed name³⁷ and would not blindly follow the earlier holdings. The cases which had been cited to support the rule were those involving persons who were required to procure a license before engaging in business, such as doctors, real estate brokers, and druggists. These cases were distinguished by pointing out that the statutory regulations there concerned served a purpose, that of insuring that only competent persons would so practice, a purpose which was entirely different from the one involved in statutes requiring the registration of an assumed name. These latter statutes did not attempt to prevent the transaction of business but merely required the performance of a statutory duty entirely collateral to the business transaction³⁸ so that, if this duty was neglected, the statute should be strictly construed and only the penalty provided therein be invoked. With the growth of this more equitable view, a number of the states in the first group, by reversal or amendment, aligned themselves with the majority view permitting recovery.

An outstanding example of that reversal can be seen in Kentucky. The court concerned in *Hunter v. Big Four Auto Company*³⁹ had followed the doctrine of the Cashin case, saying that while the act did not, in express terms, declare that it should be unlawful to transact business in violation of the statute, yet it was manifest that it was so intended. It was given an opportunity to examine into the wisdom of the Hunter case through the later case of *Hayes v. Providence Citizens' Bank & Trust Company*.⁴⁰ The plaintiff there brought an action against defendant bank to recover money he had deposited with it. Among other defenses, the defendant pleaded that the plaintiff, at the time covered in the complaint, had been doing business under the name of the "Dreamland Theatre" but had not registered that name. The trial court, after all proof was in, dismissed the jury and granted defendant's motion to dismiss the complaint. That holding was reversed on appeal. The court first noted that, in the Hunter case, it had said: "It is probable that a rule like this may, in some instances, work a hardship by permitting one person to get the benefit of another person's labor, services or property without compensation."⁴¹ It now declared that experience had "demonstrated that this is about all the rule has done." Re-examining the question, the court expressed the belief that the object of the statute was "certainly not

³⁷ *Hayes v. Providence Citizens' Bank & Trust Co.*, 218 Ky. 128, 290 S. W. 1028 (1927).

³⁸ *Uhlman v. Kin Daw*, 97 Ore. 681, 193 P. 435 (1920). In *Sutton & Company v. Coast Trading Co.*, 49 Wash. 694, 96 P. 428 (1908), the court expressed the belief that any other result would militate against the common law privilege to contract.

³⁹ 162 Ky. 778, 173 S. W. 120 (1915).

⁴⁰ 218 Ky. 128, 290 S. W. 1028 (1927).

⁴¹ 162 Ky. 778 at 783, 173 S. W. 120 at 122.

accomplished or even furthered by adding to the penalty expressly imposed the additional one of the loss of goods, chattels, or services sold or performed by one doing business in violation of the statute. Such a cumulative penal result is scarcely commensurate with the evil sought to be remedied."⁴² It accordingly repudiated the Hunter case and all Kentucky cases following it, saying that the reversal brought the state from an isolated position to one of accord with the overwhelming weight of authority.⁴³ Similar reversals have occurred in other states.⁴⁴

Not all states have been so fortunate in the effort to obtain judicial re-appraisal of the subject. In Georgia, for example, the statute had provided that "it shall be unlawful" for any person to transact business under an unregistered assumed name and declared such violation to be a misdemeanor.⁴⁵ Both the trial and the intermediate reviewing courts, in *Dunn & McCarthy, Incorporated v. Pinkston*,⁴⁶ had been of the opinion that plaintiff's violation of the act did not prevent him from instituting and maintaining a suit. The Supreme Court reversed,⁴⁷ citing the case of a physician who had failed to register in compliance with another state statute and the case of a broker who had failed to obtain a license. The Georgia legislature, however, amended the statute in 1937 so as to provide that the violator should be guilty of a misdemeanor but should "suffer no other further penalty or forfeiture on account of any such failure to register, except costs as hereinafter provided."⁴⁸ By reason thereof, the

⁴² 218 Ky. 128 at 133, 290 S. W. 1028 at 1030.

⁴³ The doctrine of the Hayes case has since been applied in *Bentley v. Regal Block Coal Co.*, 218 Ky. 258, 291 S. W. 28 (1927), and in *Mammoth Garage v. Taylor*, 220 Ky. 499, 295 S. W. 429 (1927).

⁴⁴ The Indiana case of *Horning v. McGill*, 188 Ind. 332, 116 N. E. 303 (1917), had held that violation of the statute rendered the contract void but, in *Humphry v. City National Bank of Evansville*, 190 Ind. 293, 130 N. E. 273 (1921), the court took the position that the statute did not void the contract but merely provided an opportunity to set the matter up in abatement until compliance occurred. The case of *Ayres v. McNeely*, 75 Ind. App. 327, 130 N. E. 539 (1921), states that the Horning case was overruled by the Humphry case. Oregon, in 1915, had followed the lead of the Cashin case when it decided the appeal in *Beamish v. Noon*, 76 Ore. 415, 149 P. 522 (1915). In 1920, however, the court reviewed the subject, in *Uhlman v. Kin Daw*, 97 Ore. 681, 193 P. 435 (1920), and there held that the contract was not void but that action could not be maintained until the certificate was filed. The Texas case of *Loving v. Place*, 266 S. W. 231 (Tex. Civ. App., 1924), had followed the Hunter case and the views there expressed had been applied in *Bristol v. Noble Oil & Gas Co.*, 273 S. W. 946 (Tex. Civ. App., 1925). But the highest Texas court, in *Paragon Oil Syndicate v. Rhoades Drilling Co.*, 115 Tex. 149, 277 S. W. 1036 (1925), ruled that the violation of the statute did not render the contract unenforceable unless some injury could be shown from the failure to comply. See also *Whitton Oil & Gas Co. v. Trap-shooter Development Co.*, 291 S. W. 267 (Tex. Civ. App., 1927).

⁴⁵ Ga. Code 1933, Tit. 106, §§ 301 and 303.

⁴⁶ 47 Ga. App. 514, 170 S. E. 922 (1933).

⁴⁷ 179 Ga. 31, 175 S. E. 4 (1934).

⁴⁸ Ga. Laws 1937, p. 805, Section 303 of Ga. Code 1933, as so amended, now reads: "The effect hereof shall be that no contract or undertaking entered into by any person, firm or corporation, whether heretofore or hereafter entered into,

case of *Bullard v. Holman*⁴⁹ points out that all former decisions are now ineffective. It is also worthy of note that Michigan, which had sired the doctrine of the *Cashin* case, later amended the act there interpreted so as to declare that the fact that a penalty had been provided was not to be construed to avoid a contract but that the violator should be prohibited from bringing any suit until after full compliance.⁵⁰ Other states have followed suit.⁵¹ It may be said, then, that the majority view presently held in states still within the first category, whether because of judicial decision or legislative action, now permits suit on the contracts or transactions of the statutory violator, albeit he still remains liable to punishment for his violation.

As would be expected, courts in states falling in the second group all agree that non-compliance with the statute is mere matter of abatement⁵² requiring no more than suspension of the trial until the statute has been complied with,⁵³ so that the right of action is not destroyed but only the

shall be invalidated or declared illegal on the ground that the same was entered into in a trade or partnership name not filed or registered in accordance with the laws in force at the time such contract was entered into; but all such contracts are expressly validated as against any such objection; and no suit or action heretofore or hereafter instituted by any such person, firm, partnership or corporation, whether sounding in contract or tort, shall be defeated because of any such failure to register. But the party who has failed to register his trade or partnership name at the time the suit is filed, as required by this Act, shall be cast with court costs."

⁴⁹ 184 Ga. 788, 193 S. E. 586 (1937).

⁵⁰ Mich. Stat. Ann., § 19.827, as amended by Pub. Acts 1919, No. 263.

⁵¹ The North Carolina case of *Courtney v. Packer*, 173 N. C. 479, 92 S. E. 324 (1917), following the *Cashin* case, had denied recovery. The statute was amended in 1919 so that the violator could bring action: N. C. Gen. Stat. 1943, Ch. 59, § 88. Recovery has since been allowed in *Farmers' Bank & Trust Co. v. Murphy*, 189 N. C. 479, 127 S. E. 527 (1925). A discord which had existed in the lower courts of Pennsylvania was resolved in *Lamb v. Condon*, 276 Pa. 544, 120 A. 546 (1923), favoring recovery although admitting that violators were subject to the penalty. Because of that discord, the legislature amended the act several times in an effort to clearly establish the legislative purpose. In 1945, a new statute was substituted providing that failure to comply shall not impair the validity of any contract but, before action is instituted, the violator must comply and pay a fine: *Purdon's Pa. Stat. Ann.*, Tit. 54, §§ 28.4 and 28.12. As late as 1940, the Virginia court, in *Colbert v. Ashland Construction Co., Inc.*, 176 Va. 500 at 509, 11 S. E. (2d) 612 at 616 (1940), after a long review of cases, said there could be no recovery, pointing out that it would be "strange, indeed, were the commonwealth to say to a litigant, 'You have a valid contract and the entire machinery of the state may be invoked in its enforcement, but of course you must go to jail!'" The legislature, that year, amended the act so that the violator could maintain his action after complying therewith, but it still declares his conduct to be a misdemeanor punishable by a fine up to \$1,000 and imprisonment up to one year. The "strange" result can apparently still happen in that state. The case of *Phlegar v. Virginia Foods, Inc.*, 188 Va. 747, 51 S. E. (2d) 227 (1949), now indicates that the amendment removes the taint of illegality after compliance has occurred.

⁵² See, for example, *Wallace Plumbing Co. v. Dillon*, 71 Colo. 224, 205 P. 950 (1922).

⁵³ *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App. (2d) 796, 167 P. (2d) 518 (1946).

remedy is, temporarily, affected.⁵⁴ A violator in these jurisdictions may acquire the unquestioned right and capacity to maintain the action by filing the certificate, either before or after the occurrence of the transaction or the making of the contract, or after the commencement of the action.⁵⁵ Courts of states in the third group have generally held that non-compliance does not void the contract⁵⁶ but only defers action until the certificate is filed,⁵⁷ leaving the person liable to the statutory penalty.⁵⁸

On the score of the general problem, a North Carolina court once said: "It seems impossible to suppose for a moment that the legislature, sagacious as it is and endowed, in the highest degree, with practical wisdom and practical common sense, would enact a statute, which would do so much evil and so little good, as to a clearly innocent and harmless undertaking."⁵⁹ It seems equally unfortunate that the General Assembly of Illinois should have kept its sagacity so well hidden by writing into the law of this state an act which, having been the basis of so much controversy in other states, did not clearly express the effect it was intended to have on the validity of contracts made in violation thereof. Practically every case or amendment cited herein had occurred before the Illinois act was approved and was available for study. The unfortunate having happened, it can only be said that the situation has not been aided by the decision in the instant case or by the action of the court in choosing to follow a rule rejected elsewhere from experience. That decision puts this state in the secluded position of holding to a rule which has shown itself to be only a source of injustice and hardship.

Perhaps the General Assembly, now that its handiwork has been evaluated, will give the problem the serious consideration it should have received in 1941. If that body needs some parallel, it might consider what it had to say regarding transactions entered into by foreign corporations doing business within the state without first obtaining a certificate of authority.⁶⁰ If the unauthorized contracts of such concerns are to be enforced, there is little justification for denying the same privilege to local inhabitants who have done harmless, perhaps beneficial, acts under an assumed name without first attending to its registration.

J. F. WHITFIELD

⁵⁴ *Canonica v. St. George*, 64 Mont. 200, 208 P. 607 (1922).

⁵⁵ *Peterson v. Morris*, 119 Wash. 335, 205 P. 408 (1922).

⁵⁶ *Gallafant v. Tucker*, 48 Ida. 240, 281 P. 375 (1929); *Bovee v. DeJong*, 22 S. D. 163, 116 N. W. 83 (1908).

⁵⁷ *Uhlman v. Kin Daw*, 97 Ore. 681, 193 P. 435 (1920); *Phlegar v. Virginia Foods, Inc.*, 188 Va. 747, 51 S. E. (2d) 227 (1949).

⁵⁸ *Lamb v. Condon*, 276 Pa. 544, 120 A. 546 (1923).

⁵⁹ *Price v. Edwards*, 178 N. C. 493 at 497, 101 S. E. 33 at 35 (1919).

⁶⁰ Ill. Rev. Stat. 1947, Ch. 32, § 157.125.

RECENT ILLINOIS DECISIONS.

DIVORCE—JURISDICTION, PROCEEDINGS AND RELIEF—WHETHER ATTORNEY FOR PETITIONER MAY RE-OPEN DIVORCE PROCEEDING, DISMISSED ON STIPULATION OF PARTIES, TO ENFORCE PAYMENT OF ATTORNEY'S FEE—A point of some concern to practicing lawyers has been made in the recent case of *Hefner v. Hefner*.¹ Petitioner had there acted on behalf of the plaintiff in the preparation and filing of a suit for divorce. He was, during the pendency of the proceeding, notified by his client that his retainer was terminated but no substitution of attorneys was made. Not long thereafter, the case was dismissed on a stipulation signed by the plaintiff and the defendant, as well as by defendant's attorney. More than thirty days after dismissal had occurred, petitioner took steps to have the order of dismissal vacated and sought an order fixing the amount of his fees. The trial court reinstated the case, determined the value of petitioner's services and ordered payment of such fee by both plaintiff and defendant. On appeal from that order, the Appellate Court for the First District reversed because (1) there was no basis, under the Divorce Act, for the court to make an award in favor of the attorney against his own former client,² and (2) because it was the firm public policy of the state, in the interest of the preservation of marriages, to put no stumbling blocks in the path of a possible reconciliation.³ The attorney was, therefore, remitted to any separate action he might have against either his client or the defendant, or both. The case invokes interest for the reason that the statute, although it now gives to the attorney a personal right to enforce payment of an award made for attorney's fees,⁴ still apparently fails to insure him of protection, other than by a suit on the contract of employment,⁵ in the event the plaintiff should insist on the right to dismiss the action.⁶

¹ Sub nom. *Petition of Runke*, 338 Ill. App. 179, 86 N. E. (2d) 885 (1949).

² The court noted that Ill. Rev. Stat. 1949, Ch. 40, § 16, which is the source of the court's authority to fix fees in divorce cases, limits that authority to the making of an award to be paid by the opposite party.

³ *Watson v. Watson*, 335 Ill. App. 637, 82 N. E. (2d) 671 (1948).

⁴ Ill. Rev. Stat. 1947, Ch. 40, § 16, as amended by Laws 1947, p. 818, S. B. No. 417, permits the court to make the award direct to the attorney and to grant execution thereon. As to the former practice, see *Anderson v. Steger*, 173 Ill. 112, 50 N. E. 665 (1898).

⁵ Recovery against the husband under Ill. Rev. Stat. 1947, Ch. 68, § 15, on the theory of a family expense, would seem unavailable because the parties were not living together at the time the service was rendered: *Featherstone v. Chapin*, 93 Ill. App. 223 (1901).

⁶ Ill. Rev. Stat. 1947, Ch. 110, § 176, regulating the voluntary dismissal of a suit, would not seem to prevent such action for, if reconciliation has occurred, the defendant would undoubtedly consent thereto despite any cross-complaint which may have been filed.

FRAUDULENT CONVEYANCES—TRANSFERS AND TRANSACTIONS INVALID—WHETHER OR NOT SALE OF MINOR PORTION OF STOCK AND EQUIPMENT TO ONE AND SIMULTANEOUS SALE OF BALANCE THEREOF TO ANOTHER REQUIRES APPLICATION OF BULK SALES ACT—An interesting conflict arose in *Corrigan v. Miller*,¹ between a judgment creditor of the vendor and a vendee who had purchased a minor portion of a stock of goods, not in the ordinary course of trade, without formally complying with the provisions of the Bulk Sales Act.² It appeared that the vendor, whose ex-wife had obtained a judgment against him for accrued alimony, had been operating a combined rubber tile and marble contracting business. He sold the rubber tile stock and equipment to Corrigan for approximately one-third of the aggregate price, paid in cash, but transferred the marble contracting business to another for the remaining two-thirds of the total price, payable in notes. After the ex-wife had levied on the stock and equipment which composed Corrigan's share of the purchase, he filed a claim for the return of the property so seized. A trial court judgment in his favor was reversed by the Appellate Court for the Second District when it determined that the statute applied because the two sales, having occurred simultaneously and being within the knowledge of the two purchasers, really amounted to a single transaction involving substantially all of the vendor's business stock and equipment.³

It is clear that the statute would be applicable had the two vendees purchased jointly for the term "vendee" is, by another section of the statute, defined to include the plural of that term so long as the several persons are "party on any sale."⁴ But such was not the situation in the instant case for each buyer purchased for himself, paying his own consideration and taking his own bill of sale. It is likewise clear that the sale to the other purchaser fell within the statute for, judging by the disproportionate amount paid, he had purchased at least the "major part" of the vendor's business.⁵ It is not clear, however, whether the result

¹ 338 Ill. App. 212, 86 N. E. (2d) 853 (1949).

² Ill. Rev. Stat. 1947, Ch. 121½, § 78. The statute purports to apply to the sale, in bulk, of the "*major part or the whole*" of a stock of merchandise or other goods and chattels. (*Italics added.*) It is not confined to merchandising operations and may extend to a farmer's sale of his livestock: *Coon v. Doss*, 361 Ill. 515, 198 N. E. 341, 102 A. L. R. 561 (1935).

³ The report of the case does not indicate that the purchasers, other than being employees of the vendor, in any way were aware of his intention to depart from the vicinity promptly after the sale so as to defeat the enforcement of the alimony judgment. For that matter, no claim was advanced that the two sales were based upon an insufficient consideration. It is difficult, therefore, to read into the case any desire on the part of the purchasers to help out in a known fraudulent transaction.

⁴ Ill. Rev. Stat. 1947, Ch. 121½, § 80.

⁵ That term has been defined to mean more than one-half, for a sale of a 50% interest in a business is not within the statute: *Zenith Radio Distributing Corp. v. Mateer*, 311 Ill. App. 263, 35 N. E. (2d) 815 (1941).

attained as to Corrigan is to be predicated on (1) his knowledge of the other purchase, or (2) on the fact that he bought an entire and distinct department of the vendor's business. If the former, then the simultaneous nature of the purchases is hardly significant except as it serves to prove his knowledge. A purchase of a minor share of a business by one who knows that his vendor intends, the next day, to sell the balance would, according to this case, come within the comprehension of the statute and would force such purchaser to attend to its requirements. If the latter, it does not appear from the legislative language that a vendor is to be regarded as having several businesses, particularly not at one location, merely because he may have departmentalized his operations. The decision, therefore, is one which will bear close scrutiny.

INSURANCE—CONTROL AND REGULATION IN GENERAL—WHETHER FAILURE OF LIFE INSURANCE COMPANY TO OBTAIN OFFICIAL APPROVAL FOR CONTRACT PROVISIONS, THEREBY EXPOSING IT TO A STATUTORY PENALTY, SERVES TO INVALIDATE THE UNAPPROVED PROVISIONS—Suit to recover the face amount due under a life insurance contract was begun, in *Dempsey v. National Life & Accident Insurance Company*,¹ by the named beneficiary. The company answered by setting up a military service limitation contained in the policy and alleged that the insured had died on Bataan Peninsula in the early days of World War II while in the armed forces. It offered a return of the premiums paid under the contract. Plaintiff replied that (1) the insured had been prevented, by the emergency of the Japanese invasion of the Philippine Islands, from complying with the military service rider;² (2) that the rider was inoperative as a binding contract provision because of ambiguity and indefiniteness; and (3) was illegal and void because the consent of the Director of Insurance had not been obtained to the insertion thereof in the contract.³ Decision having passed in favor of the beneficiary for the face of the policy, the insurance company appealed. The Appellate Court for the First District ordered reversal when it decided, for the first time in this state, that failure to obtain official consent to the contract provisions did not serve to invalidate the same. Its holding in that regard is probably justified by

¹ 338 Ill. App. 109, 86 N. E. (2d) 871 (1949). Feinberg, P. J., wrote a dissenting opinion. He was of the opinion that the rider relied on by way of defense was invalid for ambiguity, citing *Arendt v. North American Life Ins. Co.*, 107 Neb. 716, 187 N. W. 65 (1922). His dissenting opinion is silent on the point here considered.

² The court did not pass on the sufficiency of this excuse for non-compliance. Presumably, the insured was not excused by reason of any impossibility of performance caused by war-time conditions.

³ Ill. Rev. Stat. 1947, Ch. 73 § 755, states that no company "shall issue or deliver . . . a policy or . . . attach an endorsement or rider thereto . . . until the form and consent of such . . . rider . . . has been filed with and approved by the Director."

reason of the saving effect of Section 442 of the Insurance Code⁴ but it is worthy of notice, if for no other reason, because of the contrast it provides to the holding in *Mikelson v. Kolb*,⁵ pronounced in the same district. In each case, the failure to observe statutory requirements exposed the violator to penalties,⁶ but the contract was held enforceable in the one and not enforceable in the other. From the standpoint of the substantial equities involved, the balance would seem to favor the converse result.

SCHOOLS AND SCHOOL DISTRICTS—DISTRICT PROPERTY, CONTRACTS AND LIABILITIES—WHETHER HOLDER OF POSSIBILITY OF REVERTER OF LAND HELD FOR SCHOOL PURPOSES ONLY IS ENTITLED TO IMPROVEMENT ERECTED THEREON BY SCHOOL DISTRICT UPON CESSATION OF USE OF LAND FOR SCHOOL PURPOSES—The facts in *Low v. Blakeney*¹ disclosed that the ancestor of the plaintiffs, in 1869, had conveyed an acre of Illinois land to certain school trustees "for school purposes only" with specific stipulation for the reverter "of the said one acre of land" in the event such use should thereafter cease. A school house was erected on the premises and was used for many years. In 1945, the trustees abandoned the use of the land and took steps to sell and remove the structure so erected.² Plaintiffs, claiming ownership of the land and the building, sued to enjoin the proposed sale. The school trustees did not contest the reverter of the fee³ but did contend that plaintiffs had acquired no right in the building. Upon dismissal of plaintiffs' petition, an appeal was taken directly to the Illinois Supreme Court.⁴ That court, two justices dissenting, affirmed on the ground that (1) there was indication, from the language of the deed of an intention to retain a possibility of reverter in the land alone because of the presence of the words "said one acre of land," but that (2) an interpretation of

⁴ *Ibid.*, Ch. 73, § 1054, does state that any rider form "issued without submitting the same for approval . . . shall nevertheless be valid."

⁵ 337 Ill. App. 493, 86 N. E. (2d) 152 (1949), noted ante under Discussion of Recent Decisions.

⁶ Compare Section 446 of the Insurance Code, Ill. Rev. Stat. 1947, Ch. 73, § 1058, with Section 5 of the "assumed name" statute, *ibid.*, Ch. 96, § 8.

¹ 403 Ill. 161, 85 N. E. (2d) 741 (1949). Crampton, J., wrote a dissenting opinion concurred in by Thompson, J.

² The earlier case of *Hackett v. School Trustees*, 398 Ill. 27, 74 N. E. (2d) 869 (1947), presenting a somewhat similar situation, is distinguishable on the ground that the grantor there concerned reserved only an option to repurchase the premises whenever the school use should terminate rather than a possibility of reverter. The recent extensive consolidation that is going on among the school districts may be productive of even more variations of the problem, for grantors have not been uniform in their language.

³ But note the possible application of Ill. Rev. Stat. 1947, Ch. 30, §§ 37e-37f. That statute provides that, after its date, no right of re-entry or possibility of reverter shall be valid for more than fifty years, nor shall any such right more than fifty years old be regarded as enforceable. See also Denissen, "The Illinois Reverter Act," 36 Ill. B. J. 263-71 (1947).

⁴ Ill. Rev. Stat. 1947, Ch. 110, § 199.

Section 22 of Article 4 of the School Code⁵ revealed a legislative intent that school buildings erected on land conveyed for school purposes only should be and remain personalty both as to title and as to sale or other disposition. The common law doctrine that structures affixed to the soil are generally to be regarded as a part thereof,⁶ hence would go with the title in case of reverter, appears to have been subjected to modification, at least where school lands are concerned.

TAXATION—REDEMPTION FROM TAX SALE—WHETHER OR NOT OWNER MAY REDEEM FOR LESS THAN AMOUNT BID AT TAX SALE WHERE SALE CERTIFICATE HAS BEEN ASSIGNED—The case of *Dupuy v. Morse*¹ required the Appellate Court for the Fourth District to give interpretation to the redemption provisions of the so-called Scavenger Act² as the same applied to a situation wherein plaintiff's land had been sold for the payment of ten years of delinquent taxes and had been purchased, at the sale, by the county in which the land was located. The county had thereafter sold and assigned the certificates of purchase to the defendant for amounts substantially less than the amount bid at the sale. Plaintiff, desiring to redeem, asserted the right to do so at the price paid by the assignee, plus certain other items like subsequent taxes, interest, fees and court costs. Defendant insisted on payment of the bid price. The trial court, in a suit to compel redemption, believing that the plaintiff, in equity, should be entitled to redeem at the lower figure, so ordered. Its decree, on appeal, was reversed and remanded with a direction that the trial court should comply with the specific requirements of the redemption section of the Revenue Act.³ As the assignment of a certificate of purchase vests in the assignee all the rights and title of the original purchaser, it would seem reasonable that the assignee should be able to demand all that the assignor could have claimed. While sympathy for the taxpayer might lead to the approval of the position taken by the lower court, it is believed that the rule adopted accomplishes the legislative purpose of replacing delinquent property on the tax rolls. Encouraging the purchase of tax sale certificates by third persons, even though the discount will cause some present loss of revenue, will insure more stable governmental income for the future. Any other holding would have left the county government without revenue from the property until it was able to acquire a clear title and dispose of the fee.

⁵ *Ibid.*, Ch. 122, § 4-22.

⁶ *Matzan v. Griffin*, 78 Ill. 477 (1875).

¹ 337 Ill. App. 1, 85 N. E. (2d) 187 (1949).

² Ill. Rev. Stat. 1947, Ch. 120, § 716a.

³ *Ibid.*, Ch. 120, § 734. That statute specifies that redemption shall be for the amount for which the land was sold together with penalties. Section 716a makes cross reference thereto but makes some modification in the penalty provisions. It is otherwise silent on the subject of the problem posed in the instant case.

BOOK REVIEWS.

ENGLISH CONTRIBUTIONS TO THE PHILOSOPHY OF LAW: The Seventh Annual Benjamin N. Cardozo Lecture. Arthur L. Goodhart, K.C. New York: Oxford University Press, 1949. Pp. 44.

AN INTRODUCTION TO LEGAL REASONING. Edward H. Levi. Chicago: The University of Chicago Press, 1949. Pp. 74.

These two slender publications have more in common than the mere fact that the text of each has previously appeared in the columns of a law journal,¹ plus the further fact that each author occupies an eminent place in the field of legal education. The first is intended to demonstrate that the English view of a philosophy of law is essentially a pragmatic one, tending away from *a priori* reasoning and abstract ideas in the air. The other, to show the dynamic role of legal concepts in a society where both certainty and change are essential to development but where neither can be attained by attention simply to formalistic reasoning. They are, then, worthy of joint consideration.

The first author attacks his assignment by expounding a text borrowed from the writings of the man in whose honor the lecture was given. Justice Cardozo had written that a "philosophy of law will tell us how law comes into being, how it grows and whither it tends."² Professor Goodhart amplifies thereon by showing, briefly yet historically, how the great English legal writers and thinkers, from Bracton onward, strove to establish the concept of supremacy of law while at the same time recognizing its mutable character. Growth of law, he notes, has been left, by and large, to the hands of English judges who have supervised that growth not always from slavish regard for precedent but often with conscious awareness that the common law case system is not complete, hence may well require the formulation of new precedents to fit truly novel cases. As to the third problem, or purpose of law, he indicates that the more modern writers, while not organized into definite philosophic schools, have generally concentrated on the proposition that law, to be effective, must bring about compromise between conflicting interests so as to achieve a desirable, if not logical, uniformity. He and they agree, with Justice Cardozo, that the "philosophy of the common law is at bottom the philosophy of pragmatism."³

¹ The Goodhart paper may be found, less certain revisions, in 48 Col. L. Rev. 671-88 (1948). Professor Levi's article first appeared in 15 U. of Chi. L. Rev. 501-74 (1948).

² Cardozo, *The Growth of the Law* (Yale University Press, New Haven, Conn., 1924), p. 24.

³ Cardozo, *The Nature of the Judicial Process* (Yale University Press, New Haven, Conn., 1921), p. 102.

Professor Levi's study may be said to recognize and accept Goodhart's thought as to the pragmatic nature of Anglo-American legal philosophy, in fact he gives reinforcement thereto at the outset by demonstrating the illogic of any other belief. Books have been written, are undoubtedly in the course of being written, to prove that judges do not do what they say they do. Legal reasoning is not, nor can it be, entirely a process of strict adherence to logical forms. It is, as he suggests, more nearly a process of reasoning by example, yet with the distinction that similarities and differences between the example, that is the precedent case, and the new situation are not always to be regarded as the key factors leading to the solution. In that respect, it is uttering a truism to state that lawyers will acknowledge that "the law is not always logical at all."⁴

If Professor Levi had stopped at that point, he would have done little of real service. The balance of his study possesses far more value. He has taken three fundamental situations of divergent legal problems and carried them through all the stages of judicial development in order to show how legal reasoning does, in fact, proceed. One illustration, drawn from the realm of case law, elaborates on the "inherently dangerous" rule of *MacPherson v. Buick Motor Company*.⁵ A second, posing the problem of judicial construction of statutory law, uses the Mann Act as a guiding text. The third, showing how a court may expand on a constitutional provision, traces the judicial attitude toward the commerce clause. The treatment of all three is detailed and excellent, yet the study ends on the note that to contrast law and logic is to do a disservice to both.

What, then, does Professor Levi seek to prove? In his own words, simply that legal reasoning "has a logic of its own." Briefly, it seeks to "give meaning to ambiguity and to test constantly whether . . . society has come to see new differences or similarities . . . [It is] the only kind of system which will work when people do not agree completely." That statement is reminiscent of Goodhart's closing remark to the effect that law "must be a compromise between conflicting interests, and that the proper interpretation of the law depends not on abstract conceptions but on a wise judgment which does not forget that it is concerned with the lives of ordinary men." The parallels are sufficiently obvious to warrant the reading of both books or the consideration of neither. The person who does the latter will have only his own ignorance to blame.

W. F. ZACHARIAS

⁴ See opinion by Lord Halsbury in *Quinn v. Leatham*, [1901] A. C. 495 at 506.

⁵ 217 N. Y. 382, 111 N. E. 1050 (1916).

LABOR RELATIONS AND FEDERAL LAW. Donald H. Wollett. Seattle, Washington: University of Washington Press, 1949. Pp. xxv, 148, and appendix.

An attempt is here made to chart a new course in the field of federal policy on the subject of labor relations. Charting new courses should not prove to be unusual to the author, he having been a naval officer during the war and now being a professor at the University of Washington School of Law. To the reader, however, any appreciation of the new policy which the author visualizes must be based upon an understanding of the present policy as manifested by the statute commonly known as the Taft-Hartley Act. An evaluation of the terms of that statute being imperative, the author lays down certain principles which, in his opinion, must be accepted as basic prerequisites in any attempt to build up a constructive labor policy.

Paramount among these principles is the recognition that "collective bargaining is the most effective device for spanning the schism between organized labor and management in a free economy," and "that the administrative process is a more useful and just device for achieving economic objectives which are in the public interest than criminal or civil law." There can be no quarrel with these statements, especially in view of the past history of labor relations in this country. Obviously, collective bargaining is the only appropriate method by which free men can thresh out their mutual problems and arrive at a satisfactory solution, blunting the sharpness of their conflicting economic interests. It also seems proven that the administrative process is much better suited to deal with the problem of labor relations than time-honored and slow-moving court procedures.

The discussion of the structure of the National Labor Relations Board and its procedure does not overlook the tremendous power possessed by the General Counsel of the Board. As he has been invested with the final authority to determine what unfair labor practice charges should be investigated and what formal complaints should issue, no review of his determination is possible. The concentration of so much power in the hands of one man seems unfortunate. The Board itself is supposed to exercise jurisdiction only over industries or activities which "affect commerce." Failure to note or emphasize the trend taken by the Board, in an effort to extend its jurisdiction to hear and determine cases which have only a very loose connection with interstate commerce, leads to a belief that a more detailed discussion of these jurisdictional problems, especially by one attempting to lay the ground-work for a future federal labor policy, would have been desirable.

The analysis and evaluation of the substantive provisions of the Taft-Hartley Act is, however, extremely well done. The author here reveals not only a thorough knowledge of the legal questions involved but also a deep understanding of the human and economic problems which underly the thorny issues. It would exceed the limits of a review to discuss in detail all the questions thrown up by this book. One example might serve as an illustration. The author, dealing with union security measures, points to the fact that unions have sometimes used closed shop and union shop agreements as "instruments of abuse." Barring workers who belong to racial minority groups from admission into union membership often prevents them from earning a livelihood in a chosen occupation. The Taft-Hartley Act does not provide an adequate solution although it deals with some aspects of the problem. It is the author's judgment that the federal statute is not likely to promote individual worker freedom by insuring democratic rights to the worker within the institutional framework of strong unions. It is more likely apt to promote individual worker freedom by weakening the unions institutionally.

In that regard, the author believes the 1947 amendment to the Massachusetts Labor Relations Act deals more intelligently with the problem by forbidding the employer from discharging an employee for non-membership in a union having a union security agreement with the employer, unless the union certifies that the employee was deprived of membership for a bona fide occupational disqualification or because of proper disciplinary action. That act provides an opportunity for review of the lawfulness of the suspension or expulsion. The book, then, in general, furnishes an intelligent guide to the problems which face any effort to formulate a rational federal labor policy.

F. HERZOG

CASES AND OTHER MATERIALS ON THE LAW OF INSURANCE, Second Edition.

George W. Goble. Indianapolis, Indiana: The Bobbs-Merrill Company, Inc., 1949. Pp. xiii, 944.

When an instructor is faced with the selection of a new casebook, being faithful to his calling, he determines to examine meticulously each offering in the field and, with caliper and micrometer of thought, to gauge the quality of all. Many who have done so have all too frequently concluded that, except for the color of the binding, there are but few differences in the casebook lists of the recognized publishers. It is, therefore, a little like striking a "lost chord" when one discovers a casebook novel in its method and presentation, albeit sound. Such a casebook is the subject of this review.

Two features commend it to the writer. They are: (1) the suggested plans for the development of the subject dependant upon the time devoted to the course in insurance with a selection of cases in each instance indicative of much thought, and (2) the definite separation of life and accident insurance from that of property, a division logical enough because of the basic difference in the concept of insurable interest but one often disregarded in the format of other casebooks. The placing of the life and accident section immediately following the introductory material is itself a new approach, but a good one for, as all instructors know, it is best to begin with matters concerning which the student has the greatest familiarity. In the field of insurance, that is generally the life policy.

If, in the reviewer's creed, there is the cardinal rule that fault must be found with something, then it is the opinion of the writer that the author devotes too much space to the section on life and accident insurance. A few cases there present might well be eliminated. One is also apt to miss, and regret the absence of such basic cases in property insurance law as the decisions in *LeCras v. Hughes*¹ and *Lucena v. Crauford*.² These are negligible imperfections at most for Professor Goble has produced a casebook which undoubtedly will be well-received.

T. F. BAYER

LOCAL GOVERNMENT LAW: Text, Cases and Other Materials. Jefferson B. Fordham. Brooklyn, New York: University Casebook Series, The Foundation Press, Inc., 1949. Pp. xxx, 1060.

Few subjects in the law school curriculum are better suited to the mode of presentation followed by this author than is the course in Municipal Corporations. It is inevitable that some departure from the case system should be made to permit inquiry into the techniques and materials familiar to students of political science, since the lawyer's function in local government matters requires a knowledge of administrative procedures and management practices. He will not be limited to problems that are strictly legal in nature. Recognizing the need for orienting the student before repeatedly plunging him, without warning, into complex phases of local government, the author has prefaced each section with extensive textual material designed and written especially for that purpose. This supplementary material, which constitutes roughly a third of the book, is partly concerned with the development of the various topics, partly explanatory of the subject matter, but at times

¹ 3 Doug. 81, 99 Eng. Rep. 549 (1782).

² 2 B. & P. N. R. 269, 127 Eng. Rep. 630 (1805).

clearly sets forth trends and approaches which have become well established in spite of the enormous number of local units involved.

Since much of the material in a course in local government law cannot be adequately presented through the use of isolated cases, the supplementary material thus provided make the book a storehouse of information not readily available for presentation in lecture form by most teachers of the subject. The cases are, for the most part, of recent date, historical material having been covered in the text. They are illustrative of the judicial approach to typical, as well as to provocative, factual situations. Statutory matter has not been neglected and many typical constitutional provisions are reproduced. The author's consideration of the modern relation between local units and the federal government furnishes a valuable addition.

The demand for an approach which prepares the student with functional knowledge of local affairs in such areas as those concerning financial administration and personnel matters has been met. The modification of the traditional case system is justified by the wealth of valuable and hard-to-get information which the book contains. That fact alone places this volume among the small group of school books which will remain useful to the student when he becomes a lawyer.

J. R. BLOMQUIST

DELIBERATIONS OF THE INTERNATIONAL PENAL AND PENITENTIARY CONGRESSES: Questions and Answers. Negley K. Teeters. Philadelphia: Temple University Book Store, 1949. Pp. 198.

An introduction to this book, written by the present president of the International Penal and Penitentiary Commission, notes that the heavy tomes of the various proceedings of the eleven international congresses which have been held since 1872 are generally inaccessible, first because they are published in French, and second because shelved in few American libraries. For these reasons alone, the author has performed a labor of distinction by translating and compiling at least the questions submitted and the answers adopted by vote of these several congresses. He has added valuable historical data concerning the personalities responsible for the conduct thereof, the places which served as the scene of the deliberations, and other sidelights on the several sessions. Students of penology are here provided with material which should stimulate interest in the twelfth such congress which is to be held at The Hague in 1950.

International reaction to proposals concerning extradition, juvenile delinquency, the indeterminate sentence, prison labor, and the like, as

disclosed by the pages of this book, reflects favorably on the American efforts to advance the science of penology. Humanitarian Americans, devoting selfless and untiring energy toward the improvement of the lot of imprisoned persons, have led in these matters. It is gratifying to learn, therefore, that the first Dean of this college, while serving in the Illinois General Assembly in 1867, anticipated international action on such matters as private management of prison labor by some twenty-three years when he succeeded in securing the passage of a bill taking the Illinois penitentiary out of private hands.¹ The recognition which the book accords to other American pioneers in the field should interest all concerned in prison management.

W. F. Z.

CASES AND MATERIALS ON LAW AND ACCOUNTING: Donald Schapiro and Ralph Wienshienk. Brooklyn, New York: University Casebook Series, The Foundation Press, Inc., 1949. Pp. xxi, 935.

The importance of acquiring a knowledge of accounting, either before or during a law course, receives growing recognition. The authors of this volume have written with the stated aim of presenting the subject for law students and lawyers. "Emphasis," they say, has been "shifted from book-keeping routines and procedures to accounting as a tool in the lawyer's kit." A skillful lawyer can often analyze general books of account and make immediate and helpful suggestions. His interpretations may have bearing upon a controversy wherein the books will play an important part. He may do this because of his background of general experience, although he may not have the technical training of a real accountant. His knowledge of facts, however, must often be amplified by a knowledge of figures and the purposes to which they may be put.

The present volume starts on a very simple level of explanation concerning those phases of accounting which every lawyer is expected to know. The material progresses by easy stages to a fairly comprehensive coverage of accounting as it is known to few but the proficient and experienced. There is a fresh approach to financial statements, and a thorough consideration of the details regarding principal and income, points wherein the lawyer and the trust officer are often asked embarrassing questions. The emphasis on all material is the legal one, witness the ample supply of more than two hundred cases, from courts and commissions, which furnish authority for the discussion. A lawyer, or

¹ See Zacharias, "Joseph Meade Bailey, 1833-1895," 14 CHICAGO-KENT REVIEW 1-16 (1937), particularly pp. 4-7.

even an eager law student, could probably follow this material with understanding. Under an experienced mentor, the study would have heightened value.

MATERIALS AND PROBLEMS ON LEGISLATION. Julius Cohen. Indianapolis, Indiana: The Bobbs-Merrill Company, Inc., 1949. Pp. xiv, 567, and supplement.

Growing recognition of the importance not alone of statutory interpretation but also of the related subject matter of legislation has led to the increased teaching of courses of that character. This, in turn, has made the publication of new casebooks necessary, and Professor Cohen's book represents the latest addition to a growing parade. The title would seem to indicate a treatment of only the tasks and skills required in the drafting of legislation, but an analysis of the book's contents will demonstrate that its scope is much wider, including within its orbit problems commonly encountered elsewhere under the heading of statutory interpretation. Unfortunately, however, insufficient space has been allotted to important principles regarding the ascertainment of the meaning of ambiguous legislative language and the utilization of legislative precedents and analogies in comparison to other, from the student standpoint, less important subjects.

A chapter dealing with problems relating to investigations conducted under legislative authority contains much new material as well as presenting a novel arrangement. An additional feature is to be found in the author's method of taking a particular piece of legislation as the core of his teaching device and, working from that legislative effort as a centerpiece, developing all problems arising in connection therewith. In general, therefore, the book deserves to be classified as an excellent production.

F. HERZOG

BOOKS RECEIVED.

LAW OF TRUSTS. Ralph A. Newman. Brooklyn, New York: The Foundation Press, Inc., 1949. Pp. xi, 452.

CASES ON THE LAW OF AGENCY. Edwin R. Keedy and A. Arthur Schiller. Indianapolis, Indiana: The Bobbs-Merrill Company, 1948. Pp. x, 650.

CASES AND OTHER MATERIALS ON PRIVATE CORPORATIONS. I. Maurice Wormser and Judson A. Crane. Indianapolis, Indiana: The Bobbs-Merrill Company, 1948. Pp. xiii, 1055.

CASES AND READINGS ON CRIMINAL LAW AND PROCEDURE. Jerome Hall, Indianapolis, Indiana: The Bobbs-Merrill Company, 1949. Pp. xiv, 996.

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